TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 309.

THE LOUISVILLE TRUST COMPANY, TRUSTEE, &c., PETITIONER,

vs.

LEONARD COMINGOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 27, 1901.
CERTIORARI AND RETURN FILED JUNE 6, 1901.

(18,138.)

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INDEX.

	Original.	Print.
Caption	1	1
Notice of filing petition for review	1	1
Petition of Leonard Comingor for review	1	1
Exhibit No. 21—Order of district court dismissing petition, &c., January 26, 1901	6	5
1—Order of referee requiring petitioner to file an account, &c	10	8
2—Account of Comingor, assignee	11	9
3—Order of referee appointing Louisville Trust Company receiver	14	12
4—Motion of receiver to withdraw fund in court	15	13
5—Copy of notice	17	14
6—Certified copy of injunction	18	15
7—Response to rule	18	15
8—Order for petitioner to pay to receiver money retained as commission, &c	19	16
9—Order for petitioner to pay to receiver $3,200 as counsel fees	20	17
10—Response to rule	21	17

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 9, 1901.

	Original.	Print
Exhibit No. 12—Petition, answer, and claim of Louisville Trust Co., trustee of Simonson, Whiteson & Co	22	18
13—Order of Jefferson circuit court allowing petitioner to withdraw the sum of $46,305.03	31	25
14—Petition of Leonard Comingor for review	32	26
15—Report of referee on petition	33	27
16—Order of re-reference	35	29
17—Additional response of petitioner	36	29
18—Report of referee on order of July 16, 1900	37	31
19—Opinion of the court	46	38
20—Order dismissing petition for review	49	40
Motion of trustee to dismiss petition	51	41
Notice of motion to dismiss	51	42
Trustee's motions to dismiss and strike out	52	42
Answer and affidavit of trustee	56	45
Motion to advance	70	55
Notice of motion to advance	70	56
Order granting stay, &c	72	56
Affidavit of Leonard Comingor	73	57
Order granting motion to advance	74	58
Argument and submission	75	58
Decree	76	59
Opinion	78	60
Clerk's certificate	91	70
Writ of certiorari	92	70
Return on writ of certiorari	93	71

1 *Transcript of Record.*

United States Circuit Court of Appeals for the Sixth Circuit.

SINSHEIMER, LEVINSON & COMPANY
vs.
SIMONSON, WHITESON & COMPANY. } In Bankruptcy.

"Petition of Leonard Comingore for review."

Augustus E. Wilson, attorney for Louisville Trust Company, trustee in bankruptcy for Simonson, Whiteson & Company:

You are hereby notified that on January 28, 1901, at 12 o'clock m., I will file in the clerk's office of the United States circuit court of appeals for the sixth circuit, at Cincinnati, Ohio, my petition for review in the above-styled cause, a copy of said petition is hereto attached as part of this notice, and I will then ask to have same docketed, and for necessary orders therein to have said case set down for hearing.

LEONARD COMINGORE,
By M. A., D. A., & J. G. SACHS AND
W. M. SMITH, *Attorneys.*

I accept service of the above notice, January 28", 1901.
AUGUSTUS E. WILLSON,
Of Counsel for the Louisville Trust Company,
Trustee in Bankruptcy of said Bankrupts' Estate.

Filed Jan. 28, 1901.
FRANK O. LOVELAND, *Clerk.*

United States Circuit Court of Appeals, Sixth District.

SINSHEIMER, LEVINSON AND COMPANY, FREEMAN Brothers, and N. Snellenburg & Co.
vs.
SIMONSON, WHITESON & Co. } In Bankruptcy.

Petition of Leonard Comingor for Review.

2 The petitioner, Leonard Comingor, respectfully represents that on the 14th day of February, 1899, Sinsheimer, and others, creditors of Simonson, Whiteson and Company, filed their petition in bankruptcy in the district court of the United States for the district of Kentucky, showing that said debtors made an assignment to this petitioner December 5th, 1898, for the benefit of creditors, asking an adjudication in bankruptcy and praying a subpœna against the alleged bankrupts and this petitioner, to which said alleged bankrupts tendered answer and plea and this petitioner did, March 21st, 1899, move the court to dismiss as to him and without waiving the same, tender an answer, although nothing was

alleged against him save that he was assignee for creditors. Petitioner says that no further notice was taken of him in this proceeding and no action taken on his motion to dismiss or offer to answer. He says that in both subsequent ap*pp*eals and in all proceedings subsequent to said motion to dismiss, he was simply dropped out of the case by common consent. He says he was never treated or considered as a party to this bankruptcy proceeding by the court or the parties, since March, 1899, either in the district court or either of the appeals to this court, as the orders, pleadings and records will show. (See record in this court No. 716, page 20, paragraph 3, which record is hereinafter referred to as part hereof.)

This petitioner says further that on March 28th, 1899, said Simonson, Whiteson and Company were adjudged bankrupts and an appeal was taken to this honorable court, resulting in a reversal, with directions to the district court to allow the tendered answer of Simonson, Whiteson and Company to be filed and directing a trial on issue made. In accordance thereto said district court did on August 12th, 1899, set aside and annul said adjudication, file said answer, and on the 20th day of September, 1899, again adjudge said Simonson, Whiteson and Company bankrupts, who again appealed, Septem'er 22nd, 1899. All of the matters herein so far referred to appear n Records Nos. 716 and 777, in this court, and are referred to as parts hereof.

Petitioner says that on said last appeal the adjudication of the said district court, made the 20th day of September, 1899, was affirmed and the mandate of this court was filed below on the 17th day of May, 1900, and the case referred to Baskin, referee in bankruptcy, who did on the 28th day of May, 1900, enter an order without notice and no appearance of any one, directing this petitioner to file with him an itemized statement of receipts and disbursements as assignee under the deed of assignment of the bankrupts and to appear
3 before him in person to settle his accounts as said assignee. A certified copy of said order was served on this petitioner and is filed herewith as part hereof, marked Exhibit No. 1.

Petitioner says that he was thus required to give and did give to said referee said itemized account, from which it appeared that before any proceedings in bankruptcy he had realized on all the assets of the bankrupts, under direction and order of the State court, where a suit was pending long before any petition in bankruptcy, in which he was settling his accounts; that he realized from said assets the sum of $92,865.77, being over 22 per cent. more than the appraised value as made under oath by the appraisers appointed by the State court; that he had disbursed for expenses in carrying on the business and converting assets into cash the sum of $19,876.73; that he drew as his commissions $3,398.90, and paid his counsel for necessary services $3,200.00, all before any proceedings in bankruptcy. A copy of said statement is filed as part hereof, marked Exhibit No. 2.

Whereupon on the 20th of June, 1900, the referee entered an order appointing the Louisville Trust Company receiver herein and directing the said receiver to apply to the Jefferson circuit court, common pleas division, for an order directing the State court receiver to pay over

to the receiver herein the entire fund in said State court in the action of L. Comingor, assignee, &c., *vs.* Simonson, Whiteson and Co., at the same time directing that the receiver shall not appear in said action and shall not receive less than the whole sum in said court. Said referee's order further required petitioner herein and his counsel in said State court proceedings to appear three days thereafter and show cause why they should not pay over to the receiver the sums held by them as commissions and fees and the balance of $6,766.53, not then paid into the State court by Comingor, assignee, for creditors and still in his hands. A copy of said order is filed as part hereof, marked Exhibit No. 3. On the next day, June 21st, 1900, said trust company, receiver herein, appeared before said State circuit court and asked leave to withdraw the entire fund in court, $46,305.03, all of which was submitted to said circuit court. A copy of said motion is filed as part hereof, marked Exhibit No. 4. Accompanying said motion was a notice served on petitioner by the receiver in bankruptcy that the motion would be made before the State court June 21st, 1900, and a copy of an injunction of the district court in this matter enjoining and restraining this petitioner from making any opposition to said motion, said injunction expressly prohibiting this petitioner by name "from taking any steps, instituting or having any proceedings affecting the estate and assets of Simonson, Whiteson and Co., in any State court and especially in action No. 19944, entitled L. Comingor, &c., *vs.* Simonson, Whiteson, &c., pending in the Jefferson circuit court." A certified copy of said injunction and said notice *are* hereby filed herewith as part hereof marked Exhibits Nos. 5 and 6, respectively. All of which the State court took under advisement.

4

At the same time that the receiver in bankruptcy was applying to the State court as shown, and your petitioner was restrained from opposing or appearing in response to said notice, the referee in bankruptcy, *sua sponte*, ruled the petitioner herein to pay to said receiver the money retained by him as commissions as appears in said Exhibit No. 3. Petitioner responded June 23rd, 1900, to this rule, that he retained the money as his commissions as assignee under the deed before any proceedings in bankruptcy, and that he had used them and was unable to pay it to the receiver. A copy is herewith filed as part hereof, marked Exhibit No. 7. Immediately on filing said response, said referee adjudged the same insufficient, made the rule absolute, and ordered the petitioner to pay said sum to the receiver before June 30th, 1900. A copy of said order is filed herewith as part hereof marked Exhibit No. 8. Before said date, however, viz., June 28th, 1900, said referee, without notice or appearance of any one and *sua sponte*, entered another show-cause order and had the same served on petitioner, ruling him to pay by June 30th, 1900, to the receiver in bankruptcy the further sum of $3,000.00, "recited in his report," as having been paid to his counsel and the further sum of $200.00, shown in said report to have been paid to others counsel. A copy of which order is filed as part hereof, marked Exhibit No. 9. To which this petitioner responded June 30th, 1900, that these payments were made before any bankruptcy proceedings, that he has no

means to pay said sums to the receiver, that before the petition in bankruptcy was filed and before he had any knowledge, information or intimation that it would be filed, relying upon it that he would wind up his trust under the assignment, he filed his petition in the said court and his action is there pending and he is still subject to that jurisdiction and required to settle in the State court. A copy of this response is filed as part hereof marked Exhibit No. 10. On the same day that said response was filed, June 30th, 1900, the Jefferson circuit court declined to entertain said bankruptcy receiver's motion hereinabove shown to withdraw funds from the court, because said receiver was not a party to the action, and said court suggested that the motion would be entertained when said receiver filed its petition asserting claim to the fund as provided in section 29, Kentucky Code of Practice. Said ruling of the court is in writing and a copy thereof is filed as part hereof, marked Exhibit No. 11.

In accordance with the suggestion of the State circuit court, the receiver (who had in the meantime been chosen trustee in bankruptcy), did on the 3rd day of July, 1900, file a claimant's petition under said Kentucky Code provision, in the State circuit court, making himself a party to said action, having been directed so to do by the order of the referee in bankruptcy. A copy of said petition and exhibits attached thereto, including the said referee's order are filed as parts hereof, marked Exhibit No. 12. Thereafter, on July 5th, 1900, said trustee in bankruptcy tendered his proposed order for withdrawal of said fund accompanying the same with notice to petitioner's counsel and their response whereupon the court made him a party and entered the motion for leave to withdraw the funds then in said court, and sustained his motion and gave said trustee leave to withdraw, which was done. A copy of said motions or order and the notice to petitioner's counsel and their reply is filed as part hereof, marked Exhibit No. 13.

From all of which it appears that the trustee in bankruptcy became a party to the petitioner's suit for settlement in the State court, made it appear to said court that all its officers, including petitioner and his counsel, were paid and the fund remaining in said court would be distributed among the creditor beneficiaries of said deed of assignment and thus obtained the said fund for distribution in bankruptcy herein. At the same time, whilst this was being done, the petitioner was under injunction from the district court herein as already shown, preventing any action on his part in said State court, and at the same time was being pressed by said show-cause rules of the referee in bankruptcy to surrender his commission and pay back the money expended by him in paying counsel before any bankruptcy proceedings, his response to said rules, among other things, showing that the State court suit was pending and he was within that jurisdiction making his settlement. He, therefore, filed his petition for review by the district court, a copy of which is filed as part hereof, marked Exhibit No. 14. Upon which the referee filed his report in said district court, of which a copy is filed as

part hereof, marked Exhibit No. 15. On the 7th day of July,
6 1900, said petition for review came on for hearing before the district court, was heard, and the district court took time to consider; then, on the 16th day of July, 1900, the court entered an order referring the matter back to the referee with directions to take testimony concerning the character of the services of the petitioner and his counsel under the deed of assignment, and their value to the bankrupt estate, and directing the referee to report findings of fact and any modification he might choose to make of his former report and recommendation, a copy of which is filed as part hereof, marked Exhibit No. 16. Whereupon the referee immediately commenced taking evidence and continued to take from time to time, during which, viz.: on the 10th day of November, 1900, this petitioner filed an additional response before the referee, showing in substance that as appears in these proceedings, neither the referee nor the district court has any jurisdiction of the petitioner or of the subject-matter in controversy, and this whole proceeding is illegal and in conflict with the provisions of the bankruptcy law. A copy of said response is filed as part hereof, marked Exhibit No. 17. Thereafter the referee reported to the district court on December 11, 1900, in which report he declines to modify his former rulings and report and recommends the dismissal of petitioner's appeal to the district court for review. A copy of said report is filed herewith as part hereof, marked Exhibit No. 18. Thereafter, on December 22nd, 1900, and whilst this matter was pending before the district court, the said amended or additional response (Exhibit No. 17) was also filed in said court.

Thereafter, on the 19th day of January, 1901, the district court filed an opinion, of which a copy is filed as part hereof, marked Ex. No. 20, sustaining the referee and dismissing the petition for review and directing proper orders to be entered to that end, which orders were entered on the 26th day of Jan., 1901, and a copy of the same is filed as part hereof, marked Exhibit No. 21, and which is in words and figures as follows:

In the District Court of the United States.

SATURDAY, *January 26th*, 1901.

In the Matter of SINSHEIMER, LEVINSON & CO., &C., *vs.* SIMONSON, WHITESON & CO., D. G. SIMONSON, I. Whiteson, & Leo Stern.	In Bankruptcy.

This cause coming on to be heard on the petition of Leonard Comingor, for review of the order of court entered herein by
7 John B. Baskin, one of the referees of this court, requiring Leonard Comingor to pay over to the Louisville Trust Company, trustee in bankruptcy herein, the sums of $3,398.90 and $3,000.00 and the court being fully advised, delivered a written opinion which was filed herein, and on Jan. 19, 1901, and in pursuance of said written opinion, it is considered, ordered and decreed by

the court that said petition for review filed by said Comingor, June, 1900, is refused and dismissed, to which said Comingor excepts and it is adjudged and ordered by the court that said Comingor pay to said Louisville Trust Company, trustee, the said sums of $3,398.90 and $3,000.00 on or before February 16th, 1901, to all of which said Comingor excepts.

Your petitioner further shows that he is aggrieved by the orders of said district court and injured thereby and that the errors complained of consist:

I.

In said court holding that the referee and said court had jurisdiction and power to proceed against petitioner, Leonard Comingor, in the summary way had, he being a third party, and not one of the bankrupts, in said court refusing and dismissing said petition for review and in not sustaining same.

II.

In said court holding that it had jurisdiction and power upon the proceedings, orders and recommendations of the referee had to adjudge said Leonard Comingor in contempt, and to punish him for contempt, or to order him to pay said money.

III.

In said court holding that the referee had jurisdiction and power to proceed against said Leonard Comingor, in said summary manner had.

IV.

In said court holding that said Leonard Comingor held said money for the bankrupts and could be proceeded against in said summary manner had.

V.

In said court holding that it had the power and jurisdiction herein to grant or issue the injunction against Leonard Comingor.

8 VI.

In said court holding that said referee had the power or jurisdiction to issue said show-cause orders or rules thereon or to proceed against said Leonard Comingor in the manner had upon said orders issued.

VII.

In said court holding that the filing of said responses of Leonard Comingor gave said referee or court jurisdiction or power to proceed thereon in any manner in said matter, or in the manner had.

VIII.

In said referee and said court adjudging said responses and each of them insufficient.

IX.

In said court finding the facts to be and adjudging that said sums of money were the property of the bankrupt's estate and that said Leonard Comingor never claimed title to any of it nor made any claim of right to it, or ownership thereof at any time, and that he had never claimed to have converted it to his own use, or to have claimed it adversely to the bankrupts or the trustee or the receiver in bankruptcy.

X.

In the court's adjudging that said money was not converted by Leonard Comingor to his own use, but held for the benefit of the trustee.

XI.

In the court's adjudging that said Leonard Comingor was properly before the court in said proceedings.

XII.

In the court's failing to dismiss said contempt proceedings against Leonard Comingor and discharging him.

XIII.

In the court's finding as a fact and adjudging that said Leonard Comingor as a party to this proceeding in bankruptcy.

XIV.

In the court adjudging and ordering said Leonard Comingor to pay said sums of money to the receiver (who afterwards
9 became the trustee in bankruptcy) in the summary manner had, after ordering said receiver and trustee to make itself a party to the State court proceeding which was done, and the receiver and trustee became a party to said suit in the State court and withdrew all the money paid into the State court by said Leonard Comingor.

XV.

In the court holding that the proceedings herein against petitioner Comingor are equivalent to a plenary proceeding against him.

XVI.

In the court holding that the acts and proceedings herein by or on behalf of the petitioner, Comingor, amount to or are equivalent to or constitute a consent to the jurisdiction of the referee in bankruptcy or the district court herein, in these proceedings against petitioner.

Wherefore your petitioner prays that the orders, judgments and decrees of the district court be reviewed and revised in the matters of law and that it be adjudged that said district court was without

jurisdiction, and if that cannot be done, then adjudge that the summary proceedings herein were illegal and void or if that cannot be done then adjudge that his responses were sufficient in law and he be discharged. He prays for an order of this honorable court directing the district court to suspend the execution of its judgment of January 26th, 1901, and all further proceedings against your petitioner in this matter until the further order of this court, and he prays further for all other necessary and proper relief herein.

M. A., D. A., & J. G. SACHS,
W. M. SMITH,
Attorneys for Petitioner.

Petitioner, L. Comingor, on oath states that the statements of the foregoing petition are true as he believes.

LEONARD COMINGOR.

STATE OF KENTUCKY, }
County of Jefferson, } *ss:*

Subscribed and sworn to before me by L. Comingor, this 28th day of January, 1901. My commission expires January 6, 1904.

D. A. SACHS,
Notary Public in and for Jefferson County, Kentucky.

10 Petition of Leonard Comingor for review in matter of bankruptcy of Sinsheimer, Levison & Company *vs.* Simonson, Whiteson & Company. Filed Jan. 28, 1901. Frank O. Loveland, clerk. M. A., D. A., & J. G. Sachs and W. M. Smith, attorneys for petitioner.

EXHIBIT No. 1.

In the District Court of the United States for the District of Kentucky. In Bankruptcy.

In the Matter of SINSHEIMER, LEVENSON & CO., &c., }
vs. }
SIMONSON, WHITESON & CO., D. G. SIMONSON, I. WHITESON, and Leo Stern, Bankrupts. }

At Louisville, in said district, on the 28th day of May, A. D. 1900, before John B. Baskin, referee in bankruptcy.

No notice having been given, and no adverse interest appearing, it is hereby ordered that L. Comingor file with John B. Baskin, one of the referees of this court in bankruptcy, at his office, rooms 1001–5, Columbia building, Louisville, Kentucky, on or before June 16th, 1900, at 9.30 o'clock a. m., a detailed and itemized statement showing all the receipts and disbursements made by him of money and other assets belonging to the estates of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, together with all vouchers that he may have for any disbursements.

It is further ordered that said L. Comingor be and appear before the referee aforesaid in person on June 16th, 1900, at 9.30 o'clock

a. m., for the purpose of making settlement of his accounts as assignee of the parties aforesaid.

Witness the Honorable Walter Evans, judge of said court, and the seal thereof, at Louisville, in said district, on the 28th day of May, A. D. 1900.

[SEAL.]

THOS. SPEED, *Clerk*,
By HENRY F. CASSIN, *D. C.*

943. Ex. No. 1. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

11 EXHIBIT No. 2.

Receipts and disbursements of L. Comingor, assignee of Simonson, Whiteson and Co., of Louisville, Ky., December 6th, 1898, to Sept. 28, 1899.

Receipts.

653 collections of notes & accounts	$4,702 95	
Cash sales of merchandise, including 757 C. O. D. collections and sale of fixtures	83,231 63	
Rebates on insurance collected	268 90	
Rebate on elevator collected	17 50	
Collection a/c Legion	13 65	
Collection a/c lease of store	4,000 00	
	$92,234 63	
Cash on hand Dec'r 6th, 1898	631 14	
Total receipts		$92,865 77

Disbursements.

For insurance	459 80	
For advertising	2,314 20	
For expenses	4,196 68	
For wages	8,448 22	
For merchandise	4,457 83	
Paid Zack Phelps, att'y	200 00	
Paid D. Sachs, att'y	3,000 00	
Paid L. Comingor, assignee	3,300 00	
Paid Darwin Johnson, "receiver"	59,623 61	
Total disbursements		86,099 24
Balance in hands of L. Comingor, assignee		$6,766 53

BEN. C. WEAVER,
Expert Accountant, Louisville, Ky.

LOUISVILLE, KY., *June 14th*, 1900.

Affiant, L. Comingor, states that on Decem. 5, 1898, he was appointed and qualified as assignee of Simonson, Whiteson and Company, a firm doing business on S. S. Market street, between 4th and 5th, Louisville, Ky.

12 That since said date he has been and is now acting as such assignee.

I employed Ben. C. Weaver as expert accountant to take charge of the books and report condition of same, and to act with me until completion of my trust.

The following-named gentlemen were appointed appraisers of the merchandise, fixtures, &c., of said Simonson, Whiteson & Co., viz: Mr. Tom J. Landrum, Mr. W. T. C. Cross, and Mr. Charles Berle.

I attach hereto their signed appraisement, which they completed about December 10th, 1898, and which shows in part as follows:

Men's and boys' clothing, men's and ladies' shoes, men's and ladies' furnishing, and toys appraised at.....	$56,040 13
Fixtures, electric plant, horse & wagon appraised at.....	7,500 00
	$63,540 13

Open acc'ts & notes appraised at —.

Mr. Ben. C. Weaver took charge of the books of the company on the 6th day of December, 1898, and first counted the cash, which he found and reported as amounting to $631.14.

As soon as the appraisement was completed, Mr. Weaver having the books in charge made the following statement of the affairs of the company to a committee of creditors from New York. This committee consisted of the following-named persons:

This statement of the affairs of the company shown this committee was as follows:

Assets.

Merchandise as appraised.....	$56,040 13	
Fixtures, &c., as appraised.....	7,500 00	
Open acc'ts appraised as good.....	7,485 70	
Cash on hand.....	631 14	
Total assets.....		$71,656 87

Liabilities.

Bills payable.....	$38,305 83	
Acc'ts payable, "Eastern".....	66,249 15	
Acc'ts payable, "City".....	3,676 33	
13 Rents due & to become due.....	13,743 13	
Total liabilities.....		121,974 51
Liabilities exceed.....		$50,317 64

I at once commenced to collect all claims due to said company and as shown by Mr. Ben. C. Weaver's statement I have collected 653 open accounts amounting to $4,702.95, out of the appraised — listed as $7,485.70. This is equal to about 63 per cent. These collections I made and had made without any charges as to attorneys' fees.

The stock of merchandise, as soon as appraised, I commenced immediately to sell and continued to sell until — at which time, by order of the court, I advertised according to law, and had the remnant of the stock and the fixtures then on hand sold at auction.

Mr. Weaver's report hereto attached shows that I sold the stock of goods and fixtures, which were appraised at $63,540.13, for $83,231.63, nearly $20,000.00 more than their appraised value, during the time I purchased only $4,457.83 of mdse.

Add this purchase of mdse., $4,457.83, to the appraised value of goods in the store, it shows that I sold $67,997.96 of goods for $83,231.63; a gain of over $15,000.00 (15,233.67).

I have collected about 63 per cent. of the appraised value of the open accounts and sold the merchandise and fixtures at over twenty-two (22) per cent. over its appraised value.

The statement made by Mr. Ben. C. Weaver, hereto attached, shows in detail every step or transaction taken by me as assignee in connection with my administration of this trust, as to disposing of the stock and fixtures. It shows every item of assets collected and date of same; also every item of expense, &c., paid out by me and date of same. (I have vouchers for all expenditures where voucher could be obtained.)

L. COMMINGOR.

My counsel calls my attention to the claim of the Xenia Shoe Company. They have a specific attachment suit pending in the State court. I bonded the attachment, sold the goods, and the proceeds are embraced herein. I named them as creditors of this estate in the list. If it is determined that they are not creditors, then the proceeds of said goods are not assets herein.

The facts stated in this, my report, herein are true to the best of my knowledge.

L. COMMINGOR.

14 Subscribed and sworn to before me by L. Commingor, this 27 day of June, 1900.

My commission expires January 12, 1904.

CLAUDE W. JOHNSON,
N. P., J. C., Ky.

A copy.
Attest: THOS. SPEED, *Clerk.*

943. Ex. 2. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

Exhibit No. 3.

In the District Court of the United States for the District of Kentucky. In Bankruptcy.

In the Matter of Sinsheimer, Levenson & Co., &c.,
vs.
Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson, and Leo Stern, Bankrupts.

At Louisville, in said district, on the 20th day of June, A. D. 1900, before John B. Baskin, referee in bankruptcy.

This cause coming on to be heard, it is now ordered, adjudged and decreed that the Louisville Trust Company be, and it is, hereby appointed receiver in this cause, with power and authority, and it is hereby directed to apply to the Jefferson circuit court, common pleas division, for an order directing the receiver of said Jefferson circuit court to pay over to it, the Louisville Trust Company, receiver, the entire fund in court in the action of L. Comingor, assignee, &c., against Simonson, Whiteson & Co.; but it, the said Louisville Trust Company, receiver, shall not be authorized to appear in said action in the Jefferson circuit court as a party thereto, nor shall it consent to receive nor shall it receive any less sum than the whole fund in said Jefferson circuit court in said action.

Said receiver is further authorized and directed to take charge of and hold until further orders of court all the assets of whatsoever kind and estates of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, and also to receive from D. Sachs
15 the sum of $3,000 and from L. Comingor $3,398.90, and also from said Comingor the further sum of $6,766.53, and also from Zack Phelps the sum of $200.

It is further ordered that said D. Sachs, L. Comingor and Zack Phelps be and appear before John B. Baskin, one of the referees of said court in bankruptcy, at his office in the Columbia building, Louisville, Ky., on June 23rd, 1900, at 9.30 o'clock a. m., to show cause, if any they can, why they shall not be required to pay over to said receiver the sums aforesaid.

It is further ordered that the Louisville Trust Company, receiver, be, and it is, hereby directed to execute a bond in the penal sum of twenty-five thousand dollars for the faithful performance of its duties as receiver, said bond to be approved by John B. Baskin, referee in bankruptcy of the United States district court for the district of Kentucky.

JOHN B BASKIN,
Referee in Bankruptcy.

943. Ex. No. 3. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

EXHIBIT 4.

Jefferson Circuit Court, Common Pleas Division.

LEONARD COMINGOR, Assignee of Simonson, Whiteson & Co., Plaintiff,
vs.
D. G. SIMONSON, &c., Defendants. } Motion.

Now comes the Louisville Trust Company, receiver in bankruptcy, under an order of the Honorable John B. Baskin, referee in bankruptcy, in the matter of the petition in involuntary bankruptcy in the district court of the United States for the district of Kentucky, in bankruptcy, of Sinsheimer, Levenson & Company and others, petitioners, against Simonson, Whiteson & Co., D. G. Simonson, L. Whiteson and Lee Stern, bankrupts, by Augustus E. Willson, attorney, and presented to the court a notice to the plaintiff, L. Comingor, assignee of Simonson, Whiteson & Co., and M. A.
16 Sachs, attorney, accepted by the said Sachs, and also a certified copy of the adjudication in bankruptcy and proceedings thereon, a copy of the injunction issued by the district court of the United States for the district of Kentucky in said proceedings, including the mandate of the circuit court of appeals and the order of the said district court referring the case to the said referee in bankruptcy, and a copy of the order of said John B. Baskin, referee in bankruptcy, of June 20, 1900, and thereupon, said Louisville Trust Company, receiver in said proceedings, in obedience to said order, applied to said Jefferson circuit court, common pleas division, for an order directing the receiver of said Jefferson circuit court to pay over to said Louisville Trust Company, receiver, the entire fund in court in said action, to wit, the sum of $46,305.03, and thereupon (said motion having been considered by the court and the court being sufficiently advised, it is ordered and adjudged by the court that Darwin W. Johnson, receiver of this court, pay the entire

EXHIBIT 11.

balance of the fund in court, said sum of $46,305.03, to the Louisville Trust Company, receiver, in compliance with said order.)

AUGUSTUS E. WILLSON,
Per THE LOUISVILLE TRUST COMPANY,
Receiver in said Bankruptcy.

1900, June 30.

Endorsement by the judge:

The court declines to entertain this motion to withdraw funds from the court because the Louisville Trust Company, receiver, is not a party to this action and has no standing in court. In the present condition of the record it has no right to make any motion herein. When it has filed its petition in this action asserting its

claim to the fund in question as provided by section 29 of the code, the court will be authorized to entertain such motions and make such orders in its behalf as may be necessary and proper*ly*.

A copy.

Attest:

JOHN H. PAGE, *Clerk*,
By KATIE NOLAND, *D. C.*

No. 19944. Common pleas division. L. Comingor, ass'ee,
17 pl'ff, *vs.* Motion of Louisville Trust Co., receiver; Simonson, Whiteson & Co. 1900, June 21st, entered. 1900, June 21, filed in court. Attest: John H. Page, clerk, by R. E. Hancock, D. C.

943. Exs. 4 and 11. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

EXHIBIT No. 5.

LOUISVILLE, KY., *June* 20, 1900.

L. Comingor, Esq., assignee of Simonson, Whiteson & Co.; M. A. Sachs, Esq., attorney for L. Comingor, assignee, and for Simonson, Whiteson & Co.

GENTLEMEN: A copy of the order of John B. Baskin, referee in bankruptcy, on June 20, 1900, in the matter of Sinsheimer, Levenson & Co. against Simonson, Whiteson & Co., bankrupt-, has been served upon you and each of you, and you are hereby notified that pursuant to and in obedience to that order, the Louisville Trust Company, receiver, will, on Thursday, June 21, 1900, at or about the hour of 10 o'clock a. m., apply to the Jefferson circuit court, common pleas division, for a- order in the matter of L. Comingor, assignee of Simonson, Whiteson & Co., against Simonson, Whiteson & Co., to pay over to said Louisville Trust Company, receiver in said bankruptcy proceeding, the entire fund in court in the said action of Comingor, assignee, against Simonson, Whiteson & Co.

THE LOUISVILLE TRUST COMPANY,
Receiver in the Matter of Sinsheimer, Levenson & Co. against Simonson, Whiteson & Co. and Others, Bankrupts, in the Suit in Involuntary Bankruptcy in the District Court of the United States for the District of Kentucky, Referred to Hon. John B. Baskin, Referee in Bankruptcy,
By AUGUSTUS E. WILLSON, *Attorney.*

943. Ex. No. 5. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

18 EXHIBIT No. 6.

In the District Court of the United States for the District of Kentucky.

SATURDAY, *April* 1, 1899.

In re SIMONSON, WHITESON & Co.

On motion of petitioners herein it *it* ordered that D. G. Simonson, I. Whiteson and Leo Stern, partners as Simonson, Whiteson & Co., and individually and that Leonard Comingor and their attorneys and all persons to whom notice may come, of these proceedings, be, and they are hereby, enjoined and restrained until the further order of the court, from taking any steps, instituting or having any proceedings affecting the estate and assets of Simonson, Whiteson & Co., in any State court and especially in action No. 19944 entitled L. Comingor, &c., *vs.* Simonson, Whiteson, &c., pending in Jefferson circuit court.

A copy.
Attest: THOS. SPEED, *Clerk.*

I, John B. Baskin, one of the referees in bankruptcy of the district court of the United States for the district of Kentucky, do certify that the foregoing is a true and accurate copy of an order as appears from the records on file in my said office and in the office of the clerk of the United States district court for the district of Kentucky.

Witness my hand this 20th day of June, A. D. 1900.

JOHN B. BASKIN,
Referee in Bankruptcy.

943. Ex. No. 6. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

EXHIBIT No. 7.

District Court of the United States for the District of Kentucky.
In Bankruptcy.

SINSHEIMER, LEVENSON ET AL.
vs.
SIMONSON, WHITESON ET AL.

Before Hon. John B. Baskin, referee.

19 L. Comingor for response herein to the order to pay $3,398.90, says that, as shown in his report herein, he retained the same on account of his commissions as assignee before any bankruptcy proceedings, relying upon the fact that he would be entitled to more than that sum on final settlement; that for the services rendered the estate herein he believes this hon. court will, on a full hearing, allow him at least said amount; that he is a man of no means, has used of said money from time to time relying upon

its being his until he has none of it left. He says that he is unable to pay said money into court, having neither money or property of any kind. He says that he has recently made efforts to borrow or raise money and finds it impossible to do so. He asks the court for such relief in the premises as the court deems proper.

L. COMINGOR.

Subscribed and sworn to before me by L. Comingor June 23rd, 1900. My commission expires Jan'y 6th, 1904.

MORRIS A. SACHS,
N. P., Jeff. Co., Ky.

No. 943. Comingor's response. Ex. No. 7. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

EXHIBIT No. 8.

In the District Court of the United States for the District of Kentucky. In Bankruptcy.

In the Matter of SINSHEIMER, LEVENSON & Co., &c.,
vs.
SIMONSON, WHITESON, & Co., D. G. SIMONSON, I. WHITESON, and Leo Stern, Bankrupts.

At Louisville, in said district, on the 23rd day of June, A. D. 1900, before John B. Baskin, referee in bankruptcy.

No notice having been given, and no adverse interest appearing, comes L. Comingor, by M. A. Sachs and Alex. P. Humphrey, his counsel, and files herein a response to the rule to show cause why he should not be compelled to pay $3,398.90 to the Louisville
20 Trust Company, receiver in bankruptcy in this cause, and after hearing said counsel it is now ordered and adjudged that said response be, and the same is, hereby held insufficient and the rule to show cause why he should not pay said sum as aforesaid is hereby made absolute. It is further ordered that said L. Cominger shall pay to the Louisville Trust Company, receiver in bankruptcy, by 9.30 o'clock a. m., on Saturday, June 30, the said sum of $3,398.90.

JOHN B. BASKIN,
Referee in Bankruptcy.

943. Ex. No. 8. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

EXHIBIT No. 9.

In the District Court of the United States for the District of Kentucky. In Bankruptcy.

In the Matter of SINSHEIMER, LEVENSON & Co., &c.,
vs.
SIMONSON, WHITESON & Co., D. G. SIMONSON, I. WHITESON, and Leo Stern, Bankrupts.

At Louisville, in said district, on the 28th day of June, A. D. 1900, before John B. Baskin, referee in bankruptcy.

No notice having been given and no adverse interest appearing, it is ordered that L. Comingor be and appear before John B. Baskin, one of the referees in bankruptcy of the above court, at 9.30 o'clock a. m., on June 30th, 1900, to show cause, if any he can, why he shall not be required to pay to the receiver in bankruptcy herein the sum of $3,000 recited in his report as having been paid to M. A., D. A. & J. G. Sachs, and also the further sum of $200 recited in said report as having been paid to Zack Phelps.

JOHN B. BASKIN,
Referee in Bankruptcy.

943. Ex. No. 9. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

21 EXHIBIT No. 10.

In the District Court of the United States for the District of Kentucky.

In the Matter of SINSHEIMER, LEVENSON & Co. ET AL.
vs.
SIMONSON, WHITESON & Co., D. G. SIMONSON, I. WHITESON, and Leo Stern, Bankrupts.

L. Comingor for response to the order herein to show cause why he shall not pay the receiver in bankruptcy herein the sum of $3,000 shown in his report as having been paid Mess. M. A., D. A. & J. G. Sachs, and $200 to Zack Phelps, Esq., says that said sums were paid them respectively for services rendered him as his counsel whilst acting as assignee before any proceedings herein, as already appears in his report herein. He says further that he has no money or property or means of any kind with which to pay said money or any part thereof, and refers to his former response herein as part hereof.

He respectfully submits to the court that he ought not to be compelled to pay said money herein.

This respondent says further that long before the petition in this proceeding was filed and before he had any knowledge, information or intimation that it was intended to be filed, and relying upon it that he would be permitted to wind up his trust under the deed of

assignment for the bankrupts shown in the record in this action or proceeding, he filed his petition and brought his action in the State court as appears in this record, which is still pending, and he is still subject to the jurisdiction and orders of said State court requiring him to settle his accounts there and to be responsible there for all his acts and doings under said deed of assignment.

He submits to this hon. court that this response be held sufficient and that the "show-cause" order herein should be annulled or suspended until he is relieved from his present embarrassing position.

L. COMINGOR.

Subscribed and sworn to before me by L. Comingor, June 30th, 1900. My commission expires Jan'y 6th, 1904.

MORRIS A. SACHS,
Notary Public, Jefferson County, Kentucky.

M. A., D. A., & J. G. SACHS,
Counsel for Comingor.

22 943. Response of Comingor to pay the $3,000 paid us. Ex. No. 10. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

I, John B. Baskin, referee in bankruptcy, do certify that the foregoing five pages contain true and accurate copies of two orders and two responses filed before me in the matter of Sinsheimer, Levenson & Co., &c., against Simonson, Whiteson & Co., &c., bankrupts.

JOHN B. BASKIN,
Referee in Bankruptcy.

943. Exhibits Nos. 7, 8, 9 and 10. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

EXHIBIT 12.

Jefferson Circuit Court, Common Pleas Division.

LEONARD COMINGOR, Assignee of Simonson, Whiteson & Co., Plaintiff,
vs.
D. G. SIMONSON, &c., Defendants. } No. 19944.

Petition, Answer, and Claim of the Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson, and Lee Stern.

The petitioner, The Louisville Trust Company, states that it is a corporation, organized and doing business under and by virtue of the laws of the State of Kentucky, with power to make contracts, sue and be sued and to act as trustee and in other fiduciary capacity, and authorized to act as trustee in bankruptcy, and was so authorized at the time of its appointment and qualification as trustee, as hereinafter set forth, and is still so authorized.

Petitioner states that as trustee in bankruptcy, in the proceedings

hereinafter set forth, it is the owner of and entitled to the immediate possession of all of the money in court in this action, to wit, the sum of $46,305.03, and that it claims the right to said money and fund and that neither the plaintiff nor defendants nor anybody
23 else any longer has any title to said fund or any part thereof.

That heretofore, to wit, on the 14th day of February, 1899, certain persons, to wit, Sinsheimer, Levenson & Co., Freeman Bros., and N. Shellenborg & Co., and others, creditors of the defendants, Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, filed in the district court of the United States for the district of Kentucky, at Louisville, their petition in involuntary bankruptcy against D. G. Simonson, I. Whiteson and Leo Stern, composing the firm of Simonson, Whiteson & Co., whereby said petitioners sought to have said defendants adjudged bankrupts under and by virtue of an act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," and that said defendants, D. G. Simonson, I. Whiteson and Leo Stern, partners as aforesaid, were duly and regularly served with process of subpœna of said court with a copy of said petition as required by said act of Congress and general orders of the Supreme Court of the United States made thereunder. That thereafter, such proceedings were had therein, that heretofore, to wit, on the 28th day of March, 1899, an order, decree and judgment was entered by said court in said proceeding adjudging that said Simonson, Whiteson & Co., a copartnership composed of D. G. Simonson, I. Whiteson and Leo Stern and the individual members thereof, D. G. Simonson, I. Whiteson and Leo Stern, be and they were adjudged bankrupts within the true intent and meaning of the acts of Congress relating to bankruptcy and the matter of the bankruptcy of said parties, was thereupon, then and there referred to John B. Baskin, one of the referees in bankruptcy of said court, to take such further proceedings thereon as are required by said acts. There were other provisions in said order not material to be here set forth. Copy of said order has been heretofore filed herein with the motion of the Louisville Trust Company as receiver in bankruptcy, and is hereby made part hereof. That thereafter, the said defendants, Simonson, Whiteson & Co., and said members of that firm, appealed from said judgment to the United States circuit court of appeals for the sixth circuit, and that heretofore, to wit, on the 17th day of May, 1900, the mandate of the said circuit court of appeals of the United States for the sixth circuit, was filed in said district court, a certified copy whereof has heretofore been filed herein and is made part hereof, whereby said adjudication in bankruptcy was affirmed with costs, and an order *as* made that such proceedings be had in said cause in con-
24 formity with the opinion and decree of the court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding, and thereupon, and heretofore, to wit, on the 12th day of February, 1900, in accordance with said mandate, it was further ordered, adjudged and decreed by the district court of the United States in bankruptcy for the district of Kentucky, that the decree entered in said proceedings September

20, 1899, should stand in full force and that the petitioners, Sinsheimer, Levenson & Co., Freeman Bros., and N. Snellenberg & Co., recover of said D. G. Simonson, their costs therein expended, and the court further ordered as follows: "It is further ordered that said matter be referred to John B. Baskin, one of the referees in bankruptcy of said court, to take such further proceedings therein as are required by said acts, and that the said D. G. Simonson, I. Whiteson and Leo Stern, shall attend before said referee on the 25th day of May, A. D. 1900, at Louisville, Ky., at 10 o'clock a. m., and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said bankruptcy, all of which particulars of said orders are heretofore filed herein by the Louisville Trust Company, receiver, and now made part hereof, and that in said proceeding and heretofore, to wit, on April 1, 1899, an order was entered by the district court in said proceedings in bankruptcy, by which it was ordered that the said D. G. Simonson, I. Whiteson and Leo Stern, partners as Simonson, Whiteson & Co., and individually, and Leonard Comingor, the plaintiff in this action, and their attorneys and all persons to whom notice might come of said proceedings, are and were enjoined and restrained until the further order of the court from taking any steps instituting or having any proceedings affecting the estate and assets of Simonson, Whiteson & Co., in any State court and especially in action No. 19944, entitled L. Comingor, &c., *vs.* Simonson, Whiteson & Co., &c., pending in the Jefferson circuit court, a copy of which order, heretofore filed herein by the Louisville Trust Company, as receiver, is referred to as part hereof, and that thereafter and in pursuance of said order and heretofore, to wit, on the 20 day of June, 1900, before said John B. Baskin, referee in bankruptcy, who, under and by virtue of said proceedings, had due control thereover and jurisdiction thereof, it was ordered, adjudged and decreed that The Louisville Trust Company, this petitioner, be and was thereby appointed receiver in said cause, with power and authority to apply to the Jefferson circuit court, common pleas division, for an order directing the receiver of said Jefferson circuit court to pay over to it,
25 the Louisville Trust Company, receiver, the entire fund in court in the action of L. Comingor, assignee, &c., against Simonson, Whiteson & Co., and by said order it was further authorized and directed to take charge of and hold until further order of the court, all the assets of whatsoever kind and estates of Simonson, Whiteson & Co., composed of D. G. Simonson, I. Whiteson & Leo Stern. There were other proceedings in said order not material to here set forth, a copy of which has been heretofore filed in this action by said receiver and is hereby made part hereof. That on the said 20th day of June, A. D. 1900, it was ordered by said referee in bankruptcy that a meeting of the creditors of said Simonson, Whiteson & Co., and said D. G. Simonson, I. Whiteson & Leo Stern, be held on the 30th day of June, 1900, at the office of said referee, to elect a trustee in bankruptcy, and that thereafter and heretofore, to wit, on the 30th day of June, 1900, said meeting of said creditors was held and your petitioner, The Louisville Trust Company, -as at

said meeting duly and regularly elected to the office of trustee in bankruptcy in said proceeding of said Simonson, Whiteson & Co., and said D. G. Simonson, I. Whiteson and Leo Stern, and that thereupon your petitioner executed bond in said court and qualified as such trustee as required by law as shown by copy of order filed herewith as part hereof and has been since and is now acting as such trustee, and that heretofore, to wit, on said 30 day of June, 1900, on the motion of certain creditors of said bankrupts, it was ordered by said referee that your petitioner as trustee in bankruptcy of said estate, should present its petition as the owner of and entitled to said fund, and apply to this court for an order directing the payment of said fund to your petitioner, full particulars of which order will be seen from a copy thereof herewith filed as part hereof.

Your petitioner will, if required, set forth at length herein the allegations of the said petition in involuntary bankruptcy; but said petitions set- forth the assignment for the benefit of creditors, which is referred to in the petition of plaintiff in this action, and that by the provisions of the said bankruptcy laws of the United States such an assignment is an act of bankruptcy and gave the said district court jurisdiction to adjudge said Simonson, Whiteson & Co., and said members thereof, bankrupts in said proceeding in involuntary bankruptcy. Your petitioner further shows that it desires an administration of said estate in bankruptcy and in said bankruptcy proceeding; that said property is in the possession of this court, through its receiver.

26 Your petitioner further states that officers of this court, the clerk, sheriff and commissioner, have been paid all of their fees and have no claims upon the fund herein, and that the fund in court herein, to wit, the sum of $46,305.03, belongs to the creditors of said bankrupt firm and that nobody else has any interest therein, neither officers, attorneys nor anybody else, and that under said proceedings, the title to said fund has passed to your petitioner as the trustee in bankruptcy for the benefit of all of the creditors of said bankrupts.

Wherefore, your petitioner prays the court that this, its petition, be filed, and further prays the court to order and direct that the plaintiff make your petitioner a defendant herein, and that your petitioner's pleading and petition be taken as its answer and petition herein to the fund in court, and further prays the court to order and direct the receiver of this court to pay to your petitioner as trustee in bankruptcy in said proceedings in bankruptcy, under and by virtue of the proceedings, appointment, order and qualification, said sum of $46,305.03, and further respectfully apply- to the court for all further and proper relief.

AUGUSTUS E. WILLSON,

Attorney for Petitioner, The Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson, and Leo Stern, Bankrupts.

STATE OF KENTUCKY, }
County of Jefferson, } ss:

H. V. Loving, on oath states that he is president of the petitioner, The Louisville Trust Company, trustee in bankruptcy of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, defendants under the proceedings in the district court of the United States for the district of Kentucky, in the matter of Sinsheimer, Levenson & Co. and others, petitioning creditors, against said Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson, and Leo Stern, bankrupts, and that affiant believes that the statements of the foregoing petition are true.

H. V. LOVING.

Subscribed and sworn to before me by H. V. Loving, this 30th day of June, 1900. The date of the expiration of my commission as a notary public is the fifteenth day of February, 1902.

N. R. BROWN,
Notary Public, Jefferson County, Ky.

27 To the plaintiff, Leonard Comingor, assignee of Simonson, Whiteson & Co., and Sachs Brothers, attorneys for the plaintiff, Leonard Comingor, assignee.

GENTLEMEN: You and each of you are hereby notified that the Louisville Trust Company, receiver, as set forth in the foregoing petition, answer and claim, will, on the 30th day of June, 1900, present to the Jefferson circuit court, in case No. 19944, of Leonard Comingor, assignee of Simonson, Whiteson & Co., plaintiff, against D. G. Simonson, &c., the above petition, a copy of which is hereby delivered to each of you at the time of serving this notice, and will apply to the court to order and direct the receiver of the court upon said petition, to pay to the Louisville Trust Company, trustee in bankruptcy, the sum of $46,305.03 in court in this action, and you are notified to be present and attend if you have any objection to the granting of said order.

AUGUSTUS E. WILLSON,
Att'y for Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co., &c.

STATE OF KENTUCKY, }
County of Jefferson, } ss:

George Minor, on oath states that he executed the above notice on M. A., D. A. & J. G. Sachs, attorneys of Leonard Comingor, and on Leonard Comingor, assignee of Simonson, Whiteson & Co., by delivering to Morris A. Sachs, one of the members of Sachs Brothers, attorneys for said Comingor, assignee, at 3 o'clock p. m., and to Leonard Comingor, assignee of Simonson, Whiteson & Co., at 4.15 p. m., a copy of the above notice and the above petition on the 30th day of June, A. D. 1900.

GEO. MINOR.

Subscribed and sworn to before me by George Minor, this 30th day of June, 1900. My commission as a notary public expires February 15, 1902.

N. R. BROWN,
Notary Public, Jefferson County, Ky.

The undersigned hereby admit- that a copy of the foregoing petition and notice was delivered to —— Sachs, a member of the firm of Sachs Brothers, attorneys for said Leonard Comingor, assignee of Simonson, Whiteson & Co., and to him as attorney for the
28 plaintiff, Leonard Comingor, assignee of Simonson, Whiteson & Co., this 30th day of June, 1900.

—— ——,
A Member of the Firm of Sachs Brothers, Representing All of Them, and Attorney for Leonard Comingor, Assignee of Simonson, Whiteson & Co.

In the District Court of the United States for the District of Kentucky.

In the Matter of SINSHEIMER, LEVENSON & COMPANY
vs.
SIMONSON, WHITESON & COMPANY, D. G. SIMONSON, I. Whiteson, and Leo Stern, Bankrupts. } In Bankruptcy.

At Louisville, in said district, on the 30th day of June, A. D. 1900, before John H. Baskin, referee in bankruptcy.

On motion of the Louisville Trust Company, trustee, herein, it is ordered that said trustee file a petition to be made a party to the suit pending in the Jefferson circuit court, common pleas division, styled Leonard Comingor, etc., against D. G. Simonson, etc., and said trustee is further directed in said petition to pray the honorable Jefferson circuit court to turn over to it, the Louisville Trust Company, trustee, in bankruptcy, the fund in said Jefferson circuit court in the cause aforesaid.

JOHN B. BASKIN,
Referee in Bankruptcy.

Order Approving Trustee's Bond.

Form No. 26.

At a court of bankruptcy held in and for the district of Kentucky, at Louisville, Kentucky, this 30th day of June, 1900.

Before John B. Baskin, referee in bankruptcy, in the district court of the United States for the district of Kentucky.

29 In the Matter of SIMONSON, WHITESON & Co., &c., Bankrupt. In Bankruptcy.

It appearing to the court that the Louisville Trust Company, of Louisville, in said district, has been duly appointed trustee of the

estate of the above-named bankrupt and has given bond with sureties for the faithful performance of its official duties, in the amount fixed by the creditors (or by order of the court), to wit, in the sum of twenty-five thousand dollars, it is ordered that said bond be, and the same is hereby, approved.

JOHN B. BASKIN,
Referee in Bankruptcy.

I, John B. Baskin, one of the referees of the above-styled court in bankruptcy, do certify that the foregoing is a true and accurate copy of an order entered in the above cause on the 30th day of June, 1900, as appears from the records on file in my said office.

Witness my hand this 30th day of June, A. D. 1900.

JOHN B. BASKIN,
Referee in Bankruptcy.

A copy.
Attest:

JOHN H. PAGE, *Clerk*,
By KATIE NOLAND, *D. C.*

Exhibit 12. No. 943. No. 19944. Leonard Comingor, ass'ee, &c., *vs.* D. G. Simonson, &c. Petition, answer and claim of Louisville Trust Company, trustee in bankruptcy. 1900, July 3rd. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

EXHIBIT No. 13.

Sachs law building, 546 & 548 West Jefferson St.

M. A., D. A., & J. G. Sachs, attorneys-at-law.

LOUISVILLE, KY., *July 5th*, 1900.

A. E. Willson, Esqr.

DEAR SIR: We return papers as requested. We do not see our way clear to comply with your requests because the injunction prevents us.

As to other matters referred to in your letter will see you.

Yours, etc., M. A., D. A., & J. G. SACHS.

30 EXHIBIT No. 13.

LOUISVILLE, KY., *July 13th*, 1900.

Messrs. M. A. Sachs, D. A. Sachs, and J. G. Sachs, attorneys for Leonard Comingor, assignee of Simonson, Whiteson & Co.; Leonard Comingor, assignee of Simonson, Whiteson & Co.

GENTLEMEN: I have inquired of Judge Field whether there was any objection to filing the petition and making the order in case No. 19944, of Comingor, assignee, *versus* Simonson, Whiteson & Company, of the Louisville Trust Co., as trustee in bankruptcy, to withdraw the fund in court in accordance with its petition.

He ordered the petition filed, provided I struck out of it certain parts on the fifth page, which were put in for the benefit of the court,

and to show that you had no claim on any of the money in court, and those parts have been struck out, as they are not material to the right of the trustee to withdraw the money from the fund in court, and thereupon the petition was ordered filed and has been filed. Then I asked the judge to sign the order making the petitioner a party and giving leave to withdraw the money, and said to him that if there was any just objection to it, I was entirely willing, personally, that it should be made without injury to anybody, and that as you were under injunction, you might, so far as I had the power to grant it, explain why the order ought not to be made without appearing of record in the matter, and that I should not report your action, and I asked him to set a time and he set Thursday morning at 10 o'clock, in the court-room of the common pleas division, and I promised to notify you, and I do hereby notify you.

I request that you sign and return to me to file that morning the short amended petition making the trustee a party, which I enclose to you. I will ask you to sign the memorandum below indicating that this letter and the petition have been presented to you with the notice of the meeting for 10 o'clock Thursday morning. I do not see what we gain by argument. I would be very glad if you would make a memorandum on the enclosed motion and say that, as far as you are concerned, it is agreeable to you.

Yours truly, AUGUSTUS E. WILLSON,
Attorney for said Trustee.

31 A copy of the above letter and amended petition herein has been handed to the undersigned as attorney for L. Comingor, assignee of Simonson, Whiteson & Co., and as representative of M. A., D. A. and J. G. Sachs, attorneys, on the 3rd day of July, A. D. 1900.

____ ____,
Attorney for All of said Parties.

EXHIBIT No. 13.

Jefferson Circuit Court, Common Pleas Division.

LEONARD COMINGOR, Assignee of Simonson, Whiteson & Co., Plaintiff,
vs.
D. G. SIMONSON, ETC., Defendants.
} No. 19994. Motion and Order.

This day came the Louisville Trust Company, trustee in bankruptcy of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, by Augustus Willson, its attorney, and presented to the court its petition presented to the court June 30, 1900, and heretofore filed herein claiming the fund in court herein, together with the exhibits referred to therein and the notice therewith served on the plaintiff, Leonard Comingor, assignee of Simonson, Whiteson & Co., and on M. A. Sachs, of the firm of M. A., D. A. and J. G. Sachs, attorneys for said plaintiff, and also presented a copy of said letter

to said Comingor, assignee, and his said attorneys, showing that the motion would be presented at this time and hour, July 5th, at 10 o'clock a. m., and answer of M. A., D. A. & J. G. Sachs, attorneys thereto, and thereupon said petitioner, by Augustus E. Willson, attorney, moved the court that the said petitioner, The Louisville Trust Company, trustee in bankruptcy of said bankrupts, Simonson, Whiteson and Co., D. G. Simonson, I. Whiteson and Leo Stern, be made a party defendant to this action, and thereupon said trustee moved the court that said petition be taken as the answer and petition of the said Louisville Trust Company, as such trustee, claiming the fund in court herein, which is so ordered by the court, and
32 thereupon the said Louisville Trust Company, trustee in bankruptcy of said Simonson, Whiteson and Company, D. G. Simonson, I. Whiteson and Leo Stern, moved the court for leave to withdraw from the fund in court herein the sum of $46,305.03, and thereupon, the court being sufficiently advised, it is ordered by the court that the said petitioner, The Louisville Trust Company, trustee in bankruptcy of said Simonson, Whiteson and Co., D. G. Simonson, I. Whiteson and Leo Stern, be, and is, allowed to withdraw this day from the fund in court the sum of $46,305.03.

EMMET FIELD,
Judge of the Jefferson Circuit Court,
Common Pleas Division.

A copy.
Attest: JOHN H. PAGE, *Clerk*,
By KATIE NOLAND, *D. C.*

943. Ex. 13. No. 19944. Common pleas division. L. Comingor, ass'ee, &c., *vs.* D. G. Simonson. Motion of Louisville Trust Co., trustee in bankruptcy, &c. 1900, July 5th. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

EXHIBIT No. 14.

In the District Court of the United States for the District of Kentucky.

In the Matter of SINSHEIMER, LEVENSON & Co., &c.,
vs.
SIMONSON, WHITESON & Co., D. G. SIMONSON, I. Whiteson, & Leo Stern, Bankrupts. } In Bankruptcy.

Respectfully represents the petitioner, L. Comingor, that during the course of the proceedings herein, before John B. Baskin, one of the referees in bankruptcy of this court, a rule was issued against the petitioner to show cause why he should not be compelled to pay to the receiver the sum of $3,398.90; also another rule was issued against the petitioner to show cause why he should not pay the further sum of $3,000 by him paid to M. A., D. A. & J. G.
33 Sachs, for services as counsel for him in his capacity as assignee under the general assignment under the State law; that your petitioner filed responses to both of said rules which re-

sponses having come on to be heard were adjudged by the said referee insufficient and said rules were made absolute. Your petitioner shows that said referee erred to his prejudice in issuing both of said rules, also in adjudging both of said responses insufficient, also in making both of said rules absolute.

Wherefore, your petitioner prays that the orders of said referee above set forth may be reviewed by the honorable judge of this court.

L. COMINGOR,
By his counsel, M. A., D. A., & J. G. SACHS.

Petition for review filed with referee by M. A., D. A. & J. G. Sachs, att'ys, June 30, 1900, 9.30 a. m.

JOHN B. BASKIN,
Referee in Bankruptcy.

A copy.
Attest: THOS. SPEED, *Clerk.*

943. Ex. 14. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

EXHIBIT No. 15.

In the District Court of the United States for the District of Kentucky.

In the Matter of SINSHEIMER, LEVENSON & Co., &c., vs. SIMONSON, WHITESON & Co., D. G. SIMONSON, I. Whiteson, and Leo Stern, Bankrupts. } In Bankruptcy.

At Louisville, in said district, on the 30th day of June, A. D. 1900, before John B. Baskin, referee in bankruptcy.

Report of Referee.

This case goes to the judge upon a petition for review of the action of the referee in issuing rules against L. Comingor to pay
34 $3,398.90 retained by him for his services as assignee under the State law, and also to pay $3,000 by him paid to M. A., D. A. & J. G. Sachs for counsel fees.

Under the bankruptcy law, if L. Comingor had been elected trustee and administered the whole estate he would not be allowed more than the sum of $675. He has retained for his services $3,398.90. The record shows that no order of allowance has ever been made to him by the State court, nor by this court sitting in bankruptcy. It appears from the report made by said Comingor, in my office, that he took from the funds in his hands the following sums upon the dates set opposite thereto, to wit:

December 24, 1898...	$150 00
December 22nd, 1898...	500 00
December 21st, 1898...	150 00
December 19th, 1898...	150 00
February 13th, 1899...	100 00
February 13th, 1899...	2,348 90

It will be observed that on February 13th, 1899, he received the sum of $100.00 and the sum of $2,348.90, being the day before the petition in bankruptcy was filed.

I ruled that said Comingor was entitled to no compensation whatever, and that his retaining all the above sums as compensation was unwarranted.

In the case of L. Marx & Bro., in bankruptcy in this court (Judge Evans presiding), ruled orally that where the same party acts as assignee under the State law and trustee in bankruptcy, the commissions prescribed by the bankruptcy law might be allowed, but he expressly stated in his oral opinion that no duplication of such fees would be permitted, that is to say, that the court would not allow one fee to a trustee in bankruptcy and another fee to an assignee under the State law.

It was held by Judge Ballard *in re* Cohn, Federal cases No. 2966, or 6th National Bankruptcy Register, 379, that an assignee is not entitled to compensation for himself nor for his counsel.

The case of *In re* Freeman K. Kingman, reported on pages 518 and 519 of the First National Bankruptcy News, and also the case of *In re* Solomon & Co., reported on page 460 of the Second National Bankruptcy News (both under the present law), will throw some light upon the question involved, especially upon the point that duplication of fees would not be permitted.

Under the authority of the three cases aforesaid, I also
35 ruled that said Comingor had no legal right to pay fees to his counsel, especially when no allowance had been made by the State court therefor, and in contemplation of law said assignee must be deemed to have the funds in his possession.

These proceedings are now certified to the judge to deal with said Comingor for disobeying said rules to pay the two sums aforesaid.

All of which is respectfully submitted.

JOHN B. BASKIN,
Referee in Bankruptcy.

Referee's report. No. 943. Ex. 15. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

EXHIBIT No. 16.

United States District Court, District of Kentucky.

MONDAY, *July* 16, 1900.

In the Matter of SINSHEIMER, LEVENSON & Co.
vs.
SIMONSON, WHITESON & Co., D. G. SIMONSON, I. WHITESON, and Leo Stern, Bankrupts.

Pending the action of the court upon the report and recommendation of the referee upon the rule issued by him against L. Comingor, requiring him to pay to the trustee of the bankrupts two certain sums of money described therein, the case is referred back to the referee with instructions to him to make such testimony as may be offered, and such as may be pertinent upon the following inquiries, namely, what services, if any, were rendered by the respondent Comingor, as assignee of the firm of Simonson, Whiteson & Co., before the petition in this case was filed by the creditors, and the value thereof to the estate and creditors of the said firm; second, what services were rendered by the said respondent as such assignee after filing the petition herein, and the value thereof to the estate and creditors of the bankrupts; third, what services, if any, were rendered to the respondent as such assignee by his attorneys,
36 M. A., D. A, and J. G. Sachs, the necessity therefor, and the value thereof to the estate of said bankrupts; fourth, he will report his findings upon each of these inquiries, and also any modification he may choose to make of his former report and recommendation herein.

A copy.
Attest: THOS. SPEED, *Clerk*.

No. 943. Ex. No. 16. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

EXHIBIT No. 17.

In the District Court of the United States for the District of Kentucky.

In the Matter of SINSHEIMER, LEVINSON & Co.
vs.
SIMONSON, WHITESON & Co.
In Bankruptcy.

Leonard Comingor amends his response herein to the orders to pay $3,398.90 and $3,000.00, and for amendment says that as shown by the pleadings, record and evidence in this case taken, and the entire proceedings had herein, neither this court nor the referee in bankruptcy herein has any jurisdiction, either of this respondent or

the matter involved, to make any such orders or require respondent to answer thereto, because he says the records herein show that all transactions with reference to said two (2) sums of money took place before the petition in bankruptcy was filed herein, and that neither this court nor the referee in bankruptcy can proceed against this respondent as herein attempted by order or rule to pay or by summary process.

He says the summary proceedings provided for in the present bankrupt act (sec. 29, subsec. *b*), relates to the bankrupt alone where he conceals from the trustee while a bankrupt or after his discharge, any property belonging to the estate in bankrutcy. This does not include third parties, but relates to the bankrupt alone, under subsec. 4 of sec. 29 of said bankruptcy act, it is made an offense for any person to receive any material amount of property from a bankrupt after the petition in bankruptcy was filed. Under the present
37 act, except in cases coming under one of the two (2) above-named subsections, neither the court nor the referee has the authority (jurisdiction) to compel the payment of money in the summary way provided for under section 41; that is, by order.

Where third parties fraudulently withhold assets of the bankrupt, obtained before the filing of the petition in bankruptcy, the trustee is remanded to his right of action under sec. 23 of the act. Under that section (23) neither this court nor the referee has jurisdiction to proceed as herein attempted by order to pay or by rule or contempt process to enforce said order. He asks that said rule be discharged and said orders to pay be set aside and for his costs.

LEONARD COMINGOR.

Subscribed and sworn to before me by Leonard Comingor, this 10th day of November, 1900.

My commission expires Jan. 6, 1904.

D. A. SACHS,
N. P. in and for J. C., Ky.

A copy.
Attest: THOS. SPEED, *Clerk.*

943. Ex. 17. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

EXHIBIT No. 18.

In the District Court of the United States for the District of Kentucky.

In the Matter of SINSHEIMER, LEVENSON & Co., etc.,
vs.
SIMONSON, WHITESON & Co., D. G. Simonson, I. Whiteson, and Leo Stern, Bankrupts.
} In Bankruptcy. No. 108.

Report of Referee.

On reference of July 16th, 1900.

Filed in clerk's office December 11th, 1900.
THOS. SPEED, *Clerk.*

38 In the District Court of the United States for the district of Kentucky.

In the Matter of SINSHEIMER, LEVENSON & Co., etc.,
vs.
SIMONSON, WHITESON & Co., D. G. SIMONSON, I. Whiteson, and Leo Stern, Bankrupts.
} In Bankruptcy.

Report of Referee.

On the 16th day of July, 1900, the following special order of reference was made in this case:

"Pending the action of the court upon the report and recommendation of the referee upon the rule issued by him against L. Comingor, requiring him to pay to the trustee of the bankrupts two certain sums of money described therein, the case is referred back to the referee with instructions to him to take such testimony as may be offered, and such as may be pertinent upon the following inquiries, namely, first, what services, if any, were rendered by the respondent, Comingor, as assignee of the firm of Simonson, Whiteson & Co., before the petition in this case was filed by the creditors and the value thereof to the estate and creditors of the said firm; second, what services were rendered by the said respondent as such assignee after filing the petition herein, and the value thereof to the estate and creditors of the bankrupts; third, what services, if any, were rendered to the respondent as such assignee by his attorneys, M. A., D. A. & J. G. Sachs, the necessity therefor, and the value thereof to the estate of said bankrupts; fourth, he will report his findings upon each of these inquiries, and also any modification he may choose to make of his former report and recommendation herein."

In obedience to said order, I caused the counsel for the trustee and L. Comingor and M. A., D. A. and J. G. Sachs, to appear before me and the depositions of the following parties were taken:

C. M. S. Hebel, L. Comingor, M. A. Sachs, W. F. Turner, Ben. C. Weaver, W. W. Watts, S. J. Spalding, George Beuchel, Albert Schranz, W. W. Webb, Gus F. Rothenberger, L. W. Botts, D. A. Sachs, Joseph Dinkelspiel, Louis Dinkelspiel, John A. Stratton, Alex. Myers, Mark Sales, Theodore Harris, J. Lewis Williams, F. B. Stouffer, R. W. Croxton, J. M. Andrew, R. B. Gelatt, S. S. Meddis, N. Bierman, S. M. Goldsmith, Randal Whittier, and E. B. Kerr.

39

The deposition of I. Whiteson had been previously taken, but by stipulation of parties same was read by me on the hearing.

By further stipulation the printed records of the circuit court of appeals in this cause, being numbers 716 and 777, were also considered on the hearing under said reference.

I will make separate reports on each specific direction in the order of reference.

I.

I am directed to find:

"What service, if any, were rendered by the respondent, Comingor, as assignee of the firm of Simonson, Whiteson & Co., before the petition in this case was filed by the creditors and the value thereof to the estate and the creditors of said firm."

On December 5th, 1898, the bankrupts made a general assignment to their book-keeper, L. Comingor. Within three days thereafter, to wit, on December 8th, 1898, Comingor filed a suit in equity in the Jefferson circuit court for advice in the administration of his trust and for settlement thereof. By leave of the State court he continued to operate the store of bankrupts, selling the goods at private sale until the 30th day of January, 1899, when on the latter day he made a sale to Henry Stern, at public auction, of the remaining stock of goods and fixtures as a whole, under leave of court, for $15,000. He also sold the leasehold on the store to Henry Stern, on the 20th day of July, 1899. The petition in bankruptcy was filed February 14th, 1899. The making of these sales completed the bulk of his labor as assignee. In making a computation of the actual time engaged by said Comingor, I estimate that he was employed in the aggregate, between the making of the assignment and the filing of the petition in bankruptcy, sixty days, including Sundays and holidays, during which time his duties were onerous and his responsibility considerable. His services were such as are usual in closing out assets of such quantity. It is true, as his counsel contends, that he realized from the assets in cash, gross, the sum of $92,865.77, but he turned over to the trustee in bankruptcy $6,766.53, and the trustee further obtained from the State court the sum of $46,305.03, which the assignee had paid into court in his settlement suit aforesaid, making $53,071.56, which came to the hands of the trustee in bankruptcy.

40

Immediately after the bringing of the suit for settlement and instructions, the assignee obtained leave of court to continue the opera-

tion of the store of bankrupts, and on January 25th, 1899, he procured an order of sale for the remaining stock of goods and fixtures at public auction as a whole. In his petition, for the order of sale he represented that "the stock is so far reduced by the sales aforesaid, as to leave only the fixtures and remnants and odds and ends of a broken stock of merchandise." That representation was untrue, though it was used to obtain from Judge Field an order to sell the property as a whole. The order directed advertisement by only two insertions in the Louisville Times and by hand bills posted for three days on the store and at the court-house door. The duration of the advertisement was inadequate, ten days being the usual advertisement for chancery sales, and the advertisement of only a square and a half in the Times (as more fully explained in the deposition of S. S. Meddis taken in the State court, but adopted as his testimony in this case), was grossly insufficient and most unusual. The goods should have been separated into classes, the hats, shoes, clothing, furnishing goods, etc., etc., etc., being placed in separate lots; and then offered in such lots, so that merchants dealing in each kind of goods could bid therefor. One witness estimates that there was about $6,000 worth of hats, men's clothing, $12,000; boys' clothing, $7,000; furnishing goods, $12,000; ladies' furnishing goods, $10,000; ladies' shoes, $6,000, and men's shoes, $4,000, in the store at the time of the sale on January 30th. This evidence is not disputed by any witness. A hat merchant could not bid at the sale unless he had use for the fixtures and balance of the goods, and so with other merchants dealing in other lines of goods. It is a notable fact that though the order of sale was made on January 25th, insertions in the Times were made on the two latest possible days, Friday the 27th, and Saturday, the 28th of January (the 29th being Sunday, upon which day the Times is not issued), and the sale being Monday morning, before the paper came out. The assignee procured no further advertisement in the newspapers; he mailed no notices of the anticipated sale to creditors; and while the sale was being made he allowed the goods to remain in boxes or covered up with dust-cloths, and to remain on the different floors of the building while the sale was being conducted on
41 the first floor. Besides, he did not cause the auctioneer to exhibit an inventory of what the goods consisted, but simply caused or permitted him to state that the sale would include all the goods and fixtures in the entire building as a whole. J. Lewis Williams, a disinterested witness, testifies, and I find it to be true, that when the sale was made the store appeared to be closed, there was but a small advertisement on the door, which alone was open, no auction bell was rung and no auction flag exhibited. In addition to this the evidence shows that Abe Levy, of Levy Bros., two men by the name of Hays, one by the name of Sellinger, Louis Dinkelspiel, Joseph Dinkelspiel, and others were induced by the bankrupts, including Whiteson, not to bid at the sale.

Moreover, the evidence shows that before the sale Henry Stern, a brother of the bankrupt, Leo Stern, came from New York, and an arrangement was then made by which said Henry Stern should

buy the entire stock and fixtures for $15,000, and after paying four creditors of the firm fifty per cent. of their demands, the profits that might be realized should be divided between the bankrupts. To this arrangement I find that the bankrupts and Henry Stern were parties, and further I find that the assignee and one of his counsel were cognizant of it before the sale was made. Before this illegal contract was made and shortly before the sale, an inventory of the stock on hand was taken, and it was then ascertained by the bankrupts and Henry Stern that said stock and fixtures were worth about $67,000.

On the 14th of June, following the sale the members of the firm signed a memorandum prepared by Mr. Morris A. Sachs, reciting that they had agreed to divide equally between themselves all that may be left out of the assets of Simonson, Whiteson & Co., and what they may save from the wreck after paying the indebtedness of said firm to D. L. Newborg & Son and Stern, Falk & Co. The bankrupt, Whiteson, testifies that the arrangement was to pay only fifty per cent. of the claims of those two creditors and also fifty per cent. to two other creditors.

After the stock and fixtures were thus bought by Henry Stern for $15,000 he continued the business, adding, according to the undisputed evidence of Whiteson, between fifteen and twenty thousand dollars worth of new goods, for all of which I find, as a matter of fact, that there was realized at least the sum of $82,000, as that much was deposited in the German bank to the credit of Henry Stern by his brother, Leo Stern, who represented him in Louisville,
42 while he himself resided in New York. Allowing $20,000 as the sum realized from these new goods and allowing $15,000 more for expenses paid by check for conducting the store for five months, and there will be left $47,000 as realized from the goods which were sold for $15,000. During the time that the store was thus conducted by Henry Stern's brother, the members of the old firm were retained as clerks, receiving each $62.50 per week. Whiteson testifies, too, that notwithstanding the large salaries drawn by the bankrupts during this period, he and Simonson were paid $2,500 as the profits realized after satisfying the four creditors included in the fraudulent arrangement aforesaid. Henry Stern, Leo Stern, Simonson, and the four creditors thus preferred are not introduced to deny this evidence of Whiteson's; and in the case of D. L. Newborg & Co., Whiteson is corroborated by the fact that Leo Stern purchased drafts aggregating $9,443.00 which were sent to Henry Stern in New York and by him paid over to D. L. Newborg & Son, and their endorsements appear thereon. The books of this new business conducted by Henry Stern will either sustain or contradict the testimony of Whiteson, yet it appears from a letter of Leo Stern (Exhibit "3" with the deposition of Whiteson) that those books were burned.

In the face of the fact that these preferred creditors are not brought to contradict Whiteson, I assume and therefore find that his testimony is true in that regard. The making of the memorandum in Mr. Sachs' office reciting the agreement, though subsequent

in time, is a corroboration of Whiteson's statement that the agreement was made. The assignee and his counsel strongly deny all knowledge of the guilty arrangement above recited and flatly contradict Whiteson, who testifies to their positive participation in that arrangement. Several witnesses testify that Whiteson is not worthy of belief on oath, and in his answer filed in the State court he swears to facts diametrically opposed to his testimony in this case, but nevertheless he is corroborated in so many essential particulars, and though the witnesses who could contradict his testimony are presumably obtainable, they were not introduced before me and therefore I am constrained to find that his testimony as to the making and carrying out of that fraudulent agreement is true.

Whiteson shows, and Henry Stern and the other bankrupts are not brought to contradict him, and he produced a memorandum, partly written in the handwriting of Henry Stern, that a week or ten days before the assignment the stock was valued at $170,000, and this valuation he says was verified by Henry Stern. He
43 further produced a memorandum book of his own, showing the estimate placed upon the stock by appraisements the day before the sale of January 30th. This aggregates $67,000, including the fixtures. In this, too, he is uncontradicted.

The defense to the inadequacy of the advertisement is made that it was ordered by the State court. That is true; but the assignee and his counsel controlled the case in court, and such cases are practically *ex parte*, and Judge Field made that order of sale upon such brief and insufficient advertisement by the procurement of the assignee or his counsel and upon the sworn petition of the assignee, in which he misrepresents the character of the goods as well as the quality, and this, too, without notice to any of the parties so far as the records show. In such cases the court almost invariably relies upon the counsel for the propriety of the order and almost invariably permits counsel to prescribe the extent of the advertisement.

The terms of that order of sale did not, however, preclude the assignee from adopting the methods usual in making sales of such a large quantity of goods. The order did not direct him to scatter the goods over four floors of a large building and to conduct the sale on one floor. It did not direct the assignee to keep a large part of the goods concealed in boxes or covered by dust-cloths, nor to withhold from the auctioneer and the prospective bidders all knowledge of what they might be buying and the quantity and quality of the same; and it did not direct the assignee not to exhibit an auction flag or ring an auction bell; it did not direct him to postpone the insertion of the advertisement in the paper until the latest possible days.

These acts and omissions of duty could evidence but one thing, and that was the design to suffer a fraudulent sale to be made. I therefore find and report, (1) that the haste in bringing the settlement suit in the State court; (2) the manner of procuring the order of sale without notice; (3) the terms of the order of sale; (4) the brief and limited advertisement; (5) the compression of the size of the advertisement into a square and a half in the newspaper; (6)

the instructions of Comingor to insert it in the usual way for court sales without display and the late insertion thereof; (7) the previous request of Simonson to Stouffer at the newspaper office not to display the advertisement; (8) the request of Simonson to Gelatt not to mention in the Louisville Commercial that a sale would take place; (9) the undisputed threats of Heyman that he would move to have the order of sale vacated and his action in not doing
44 so because satisfied by a personal promise of Aaron Kohn that his clients would receive fifty per cent. of their demands; (10) the failure of Mr. Sachs to call Levy and Caldwell to deny the statement made by Whiteson that Levy was by his advice bought off from bidding at the sale; (11) the failure to take the testimony of the other persons who are shown by Whiteson to have been induced not to bid at the sale; (12) the failure to introduce Leo Stern, Henry Stern and D. G. Simonson to contradict Whiteson; (13) the actual execution in Mr. Sachs' office, in June, of a memorandum of the previous fraudulent agreement; (14) the drafts obtained from the German bank and sent to D. L. Newborg & Son, one of the creditors mentioned in said fraudulent agreement, through Henry Stern, thus evidencing that they were paid in pursuance of that fraudulent agreement; (15) the selling of the stock scattered throughout the entire building without exhibiting to the bidders, and without an inventory and without even announcing of what it consisted or ringing a bell or exhibiting an auction flag; (16) closing the front of the store except the door (the assignee and Mr. D. A. Sachs being present at the sale); (17) the misstatement in the petition for sale that the goods consisted of the remnants and odds and ends of a broken stock in order to secure from Judge Field an order for the sale of the same as a whole; these circumstances, among many others, have forced me to make the finding. I, therefore, find upon the first point of the reference that the services of the assignee as a whole were of no value to the estate and creditors of the firm of Simonson, Whiteson & Co., but were a positive pecuniary injury.

II.

"As to the services rendered by the assignee after the filing of the petition in bankruptcy," I report that these services were merely nominal and were therefore of a small value; the only thing of consequence done by him after the bankruptcy proceedings were begun being the sale of the leasehold on the store of the building. The testimony does not show what would be a fair compensation for making that sale.

III.

"As to what services, if any, were rendered to the assignee by his attorneys, M. A., D. A. & J. G. Sachs, the necessity therefore and the value thereof to the estate of bankrupts," I find that one of said attorneys was actively engaged as counsel for the assignee for
45 about the same length of time that the assignee was himself actually employed, to wit, about sixty days, but beyond that time, to wit, after the filing of the petition in bankruptcy, his serv

ices to the assignee were of an unimportant character. Beyond the fact of drawing the assignment, advising the assignee how to prepare the inventories required by the State law, bringing the suit and obtaining authority to conduct the business at retail and the giving of such frequent advice, as is usual in important trusts of that character, there was no necessity for their services. This finding that there was no such further necessity is based upon my previous finding in this report that the obtaining of the order of sale and the advice following and incidental thereto were improper and therefore unnecessary. For the services thus found to have been necessary, I report that $1,000 would be ample and full compensation. But if the services rendered by the counsel must be considered as a whole, inasmuch as I have found that some of the acts of the assignee and his counsel were not beneficial but on the other hand were injurious to the estate, and not rendered in the real interest of the creditors, I am constrained to report that said counsel should be allowed nothing for their services.

The testimony offered upon this question of compensation was all introduced by them; it was intended to cover their entire services without separating those acts which I find unnecessary and improper from those reported to be necessary.

This evidence does, however, establish the fact that the $3,000 claimed by them for their entire services is usual and reasonable according to the scale of compensation allowed for such services by the State court in Louisville.

But as I am presumed to know something about such compensation myself, and am unable to report that such a large sum as $3,000 is unreasonable, I find from my own knowledge of such matters, without any further evidence upon the subject, that $1,500 would be reasonable and ample for the work of the counsel extending over the whole period of the time they were acting for the assignee but this conclusion is made to depend upon the assumption that their services were rendered in good faith and for the benefit of the estate, the contrary of which I have found.

IV.

The order of reference further directs me to report any modification I may choose to make of my former report and recom-
46 mendations. In view of the decisions in the cases of Gilblom and King, 2nd National Bankruptcy News and Reports (November 1st, 1900, number), page 1046, which are to the effect that the assignee is not entitled to compensation nor to his expenses for counsel fees under circumstances similar to those in this cause, I make no modifications of my former report and recommendations, but, on the contrary, recommend that the appeal of said Comingor and M. A., D. A. and J. G. Sachs, from said former ruling, which is to the effect that said Comingor shall pay to the trustee the sum of $3,398.90 retained by him for his services as assignee and the further sum of $3,000 paid by him to M. A., D. A. & J. G. Sachs, be overruled, and that my said order be confirmed and enforced by this honorable court.

The testimony taken before me is herewith returned with this report in a separate package, marked as follows: "Testimony taken before the referee pursuant to order of reference, entered July 16th, 1900."

All of which is respectfully submitted.

JOHN B. BASKIN,
Referee in Bankruptcy.

A copy.
Attest: THOS. SPEED, *Clerk.*

943. Filed Jan. 28, 1900. Frank O. Loveland, clerk.

EXHIBIT No. 19.

Not to be reported.

United States District Court, District of Kentucky.

by the common council in the form of an ordinance which

In the Matter of SINSHEIMER, LEVENSON & Co., ETC., *vs.* SIMONSON, WHITESON & Co., D. G. SIMONSON, I. Whiteson, and Leo Stern, Bankrupts. } Opinion. In Bankruptcy.

The referee, at the instance of the trustee in this case, and after full writ en response, in June, 1900, ruled the assignee, L. Comingor, to pay to the trustee as part of the assets of the bankrupts, certain funds in his hands acquired under the voluntary assignment to
47 him which was the sole basis of the adjudication of bankruptcy in this case. The court was soon afterwards, upon the petition of Comingor, asked to review this ruling of the referee. Pending a decision of that question, and in order to acquire fuller information, the court, on July 16th, 1900, referred the case to the referee for the ascertainment of certain specific facts bearing thereon. The referee has filed a report in response to that order, which, together with the other testimony, to say the least, discloses a remarkable state of facts, but which I shall not notice in detail. Since this last report was made in December, 1900, and still pending the consideration of the original petition for a review, the assignee, Comingor (who, it may be remembered, was actually a party to the original bankruptcy petition), has tendered to the court an amended response in which the claim is made for the first time (although probably in perfect fairness the claim might be considered as relating back to November 10th, 1900, when the amended response was offered to be filed, before the referee, who declined it because he was hearing evidence only under the special order of July 16th, 1900), that the court has not jurisdiction of this proceeding against Comingor, because it is presumed, of the ruling of the Supreme Court of the United States in the case of Bardes *vs.* Hawarden Bank, 178 U. S., 524, and possibly because of the ruling of the circuit court of appeals for this circuit in the recent case of W. T. Nugent. Without entering into an argument upon the subject, it may suffice to

say that it does not seem to me that the case before me is reached, in principle, by the Bardes case, and while I have not seen the opinion of the court in the Nugent case, it is well known to me that the facts are very different from the facts in this case. But whether the case would come within that of Bardes *vs.* The Bank, or not, Comingor has in no way claimed any adverse right, as owner, to the fund which he received by the act of bankruptcy on which the adjudication herein was made, and the State court, has long since surrendered to the trustee all of the fund so derived, but Comingor thinks something should be allowed to him for compensation for what he had done in the administration of the trust before the adjudication in bankruptcy, and for certain expenses incurred therein in the way of attorneys' fees. He submitted himself to the jurisdiction of this court in these proceedings upon these questions, and insisted in his original response filed in June, 1900, that he should, in equity and justice, be allowed to retain an amount sufficient to cover his own compensation and the sums which he claims
48 to have paid to his attorneys. It was concerning these claims thus submitted without objection to the jurisdiction and judgment of this court and after a decision thereon by the referee, that the reference of July 16th, 1900, was made. But for the peculiar character of the services alike of Comingor and his counsel, the trust fund would have been larger by an amount very much greater than the sums they claim, and could, in that event, have well afforded to be taxed with what they ask. In that case the justice of so taxing it would be manifest. I think under these circumstances that the Bardes case does not apply, and without knowing the reasoning of the court in the Nugent case I assume from my knowledge of the facts of that case that it cannot apply here, particularly as Nugent made timely objection to the jurisdiction of the court.

But whether or not, in the abstract, the general principles announced in those cases would otherwise govern the matter now before the court. I think that by the failure of Comingor to interpose any objection to the jurisdiction of the court or to the form of procedure during the long pendency of this proceeding against him, namely, between the time it was begun and November 10th, 1900, or what is probably accurate, December 22nd, 1900, there was a consent upon his part to the jurisdiction of the court and a waiver of all objection to this proceeding based upon that ground.

It seems to me that this conclusion is sound, and that it is demonstrated to be so by the reasoning of Judge Lowell in his opinion *In re* Steuer, 104 Fed. Rep., 976, and by the authorities he cites. Litigants, objecting merely to the forum or to the mere form of a proceeding, must do so seasonably and promptly, or the objection is waived.

During the entire course of the proceeding, and up to November 10th, 1900 (indeed, possibly up to December 22nd, 1900), Comingor submitted himself without objection to the jurisdiction of the court, and was seeking to convince it of the justice of his claim to the compensation and expenses alluded to. The court would be strongly inclined to allow something upon each of these items, were it not

that the facts shown by the evidence perfectly satisfies the court that the services, both of Comingor and of his counsel, instead of benefitting the trust estate, were most injurious thereto, and that instead of intending to benefit the trust, both Comingor and his counsel rather purposed to benefit somebody else. The court is not inclined, under the circumstances, to write with a strong pen
49 about these facts, but the evidence is very clear and satisfactory, that such a state of case exists as to forbid a court, when trying the question upon its merits, to allow to persons, whose relations to the trust fund were such as were those of these parties, any compensation out of that fund for services such as are claimed for in this instance.

Without undertaking to go into detail into the reasons for the conclusion, the court will dismiss the petition for a review of the action of the referee in this regard, and will approve and confirm that action.

Proper orders can accordingly be prepared.

Jan. 19, 1901.

A copy.
Attest: THOS. SPEED, *Clerk.*

108. 943. Sinsheimer, Levenson & Co. *vs.* Simonson, Whiteson & Co. Opinion. Filed Jan. 19, 1901. Thos. Speed, cl'k. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

EXHIBIT No. 20.

In the District Court of the United States for the District of Kentucky.

SATURDAY, *January* 26, 1901.

In the Matter of SINSHEIMER, LEVENSON & Co., &c., *vs.* SIMONSON, WHITESON & Co., D. G. SIMONSON, I. Whiteson, & Leo Stern.	In Bankruptcy.

This cause coming on to be heard on the petition of Leonard Comingor, for review of the order of court entered herein by John B. Baskin, one of the referees of this court, requiring Leonard Comingor to pay over to the Louisville Trust Company, trustee, in bankruptcy, herein, the sums of $3,398.90 and $3,000.00 and the court being fully advised, delivered a written opinion which was filed herein, and on Jan. 19, 1901, and in pursuance of said written opinion, it is considered, ordered and decreed by the court that said petition for review filed by said Comingor, June, 1900, is refused and dismissed, to which said Comingor excepts and it is ad-
50 judged and ordered by the court that said Comingor pay to said Louisville Trust Company, trustee, the said sums of

$3,398.90 and $3,000.00 on or before February 16, 1901, to all of which said Comingor excepts.

A copy.
Attest: THOS. SPEED, *Clerk.*

943. Filed Jan. 28, 1901. Frank O. Loveland, clerk.

51 United States Circuit Court of Appeals, Sixth Circuit, at Cincinnati.

SINSHEIMER, LEVENSON & COMPANY, FREEMAN Brothers, and N. Snellenburg & Co. *vs.* SIMONSON, WHITESON & Co. } In Bankruptcy. Motion.

The Louisville Trust Company, trustee in bankruptcy of Simonson, Whiteson & Co., bankrupts, by Augustus E. Willson, of counsel, files its notice accepted by counsel for the petitioner, Leonard Comingor, and thereupon move court to dismiss the petition, because the petitioner, Leonard or, has not filed herein a complete record containing in not by reference, all the papers, exhibits, depositions and ceedings which are necessary to the hearing in this court, a t no true copy of the record has been transmitted by the cle f the district court of the United States under his hand and seal as required by the rules of this court.

AUGUSTUS E. WILLSON,
Of Counsel for said Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co.

943. Motion to dismiss. Filed Feb. 12, 1901. Frank O. Loveland, clerk.

United States Circuit Court of Appeals, Sixth Circuit, at Cincinnati.

SINSHEIMER, LEVENSON & COMPANY, FREEMAN Brothers, and N. Snellenburg & Co. *vs.* SIMONSON, WHITESON & Co. } In Bankruptcy. Notice.

The petitioner, Leonard Comingor, and his counsel, William M. Smith, are hereby notified that on Tuesday, the 12th day of February, 1901, the Louisville Trust Company, trustee in bankruptcy of Simonson, Whiteson & Co., bankrupts, defendant to his peti-
52 tion herein, will move the court to dismiss this petition and not to hear this case, because a complete record containing in itself all the papers, exhibits, depositions and other proceedings, which are necessary to the hearing in this court, have not been filed, and in the event the court overrules said motion, will move the court not to hear the case until such complete record shall have

been filed, and additional motion to strike out, etc., copy of which is herewith.

AUGUSTUS E. WILLSON,
Of Counsel for Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co.

—— ——, of counsel for petitioners.

STATE OF KENTUCKY, }
County of Jefferson, } ss:

George Q. Minor, on oath states that he served the within notice on February 11th, 1901, at 11 o'clock and 50 minutes a. m., by delivering a true copy thereof, and of each of the motions therein referred to, to William M. Smith, attorney for petitioner, Leonard Comingor, at his office in Louisville, Ky.

GEO. Q. MINOR.

Subscribed and sworn to before me by George Minor this 11th day of February, 1901.

[SEAL.]

N. R. BROWN,
Notary Public, Jefferson Co., Ky.

943. Notice of motion to dismiss. Filed Feb. 12, 1901. Frank O. Loveland, clerk.

United States Circuit Court of Appeals, Sixth Circuit, at Cincinnati.

SINSHEIMER, LEVENSON & COMPANY, FREEMAN Brothers, and N. Snellenburg & Co.
vs.
SIMONSON, WHITESON & CO. } In Bankruptcy.

Motion of the Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co.

The Louisville Trust Company, trustee in bankruptcy of Simonson, Whiteson & Co., bankrupts, by Augustus E. Willson, of
53 counsel, objects to advancing the hearing of the petition for review filed herein January 28, 1901, and the case being set in the present February term and to submitting said petition for review at said term, and to the order suspending the execution of the judgment entered in the district court of the United States for the district of Kentucky on January 26, 1901, requiring the petitioner, Leonard Comingor, to pay said Louisville Trust Company, trustee in bankruptcy, the sum of $3,398.90 and $3,000.00 on or before February 16, 1901, or to suspend proceedings against said Comingor in said district court, and moves to dismiss said petition for review, and objects to the court proceeding farther herein, and moves to dismiss and refuse said petition of Leonard Comingor for review, because said petitioner has not filed, nor does he claim in said petition to file, a transcript of the whole record and proceedings in which he claims there was error in said judgment of said district

court, and because the court has no jurisdiction in the matter, except appellate jurisdiction, and said petitioner has attempted to institute in this court an original action selecting such parts of the record as he deems material, and omitting all of the testimony taken in said proceeding.

Said trustee further moves the court to strike out of said petition the following parts thereof, to wit:

1. The words "Petitioner says that no further notice was taken of him in this proceeding and no action taken on his motion to dismiss or offer to answer."

2. Also the words, "He says that in both subsequent appeals and in all proceedings subsequent to said motion to dismiss, he was simply dropped out of the case by common consent. He says he was never treated or considered as a party to this bankruptcy proceeding by the court or the parties, since March, 1899, either in the district court or either of the appeals to this court, as the orders, pleadings and records will show. (See record in this court No. 716, page 20, paragraph 3, which record is hereinafter referred to as part hereof.)" Because it is not shown by the transcript of the record filed, but is an allegation not based upon the record, but upon his inference from the record.

3. Also the words, "without notice and no appearance of any one" for the same reason given under above No. 2.

4. Also the words, "from which it appeared that before any proceedings in bankruptcy he had realized on all the assets of
54 the bankrupts, under direction and order of the State court where a suit was pending long before any petition in bankruptcy, in which he was settling his accounts; that he realized from said assets the sum of $92,865.77, being over 22 per cent. more than the appraised value as made under oath by the appraisers appointed by the State court; that he had disbursed for expenses in carrying on the business and converting assets into cash the sum of $19,876.73; that he drew as his commissions $3,398.90, and paid his counsel for necessary services $3,200.00, all before any proceedings in bankruptcy."

5. Also the following words: "And directing the said receiver to apply to the Jefferson circuit court, common pleas division, for an order directing the State court receiver to pay over to the receiver herein the entire fund in said State court in the action of L. Comingor, assignee, &c., *vs.* Simonson, Whiteson & Co., at the same time directing that the receiver shall not appear in said action and shall not receive less than the whole sum in said court."

6. Also the following words: "On the next day, June 21, 1900, said trust company, receiver herein, appeared before said State circuit court and asked leave to withdraw the entire fund in court, $46,305.03, all of which was submitted to said circuit court. A copy of said motion is filed as part hereof, marked Exhibit No. 4. Accompanying said motion was a notice served on petitioner by the receiver in bankruptcy that the motion would be made before the State court June 21st, 1900, and a copy of an injunction of the district court in this matter, enjoining and restraining this petitioner

from making any opposition to said motion, said injunction expressly prohibiting this petitioner by name 'from taking any steps, instituting or having any proceedings affecting the estate and assets of Simonson, Whiteson & Co., in any State court and especially in action No. 19944 entitled L. Comingor, &c., *vs.* Simonson, Whiteson & Co., pending in the Jefferson circuit court.' A certified copy of said injunction and said notice are hereby filed herewith as part hereof, marked Exhibits Nos. 5 and 6 respectively. All of which the State court took under advisement. Also Exhibit No. 4 therewith."

7. Also the words: "That the receiver in bankruptcy was applying to the State court as shown, and your petitioner was restrained from opposing or appearing in response to said notice."

8. Also the words: "On the same day that said response was filed, June 30th, 1900, the Jefferson circuit court declined
55 to entertain said bankruptcy receiver's motion hereinabove shown to withdraw funds from the court, because said receiver was not a party to the action and said court suggested that the motion would be entertained when said receiver filed its petition asserting claim to the fund as provided in section 29 Kentucky Code of Practice. Said ruling of the court is in writing and a copy thereof is filed as part hereof, marked Exhibit No. 11;" and Exhibit No. 11 therewith.

9. Also the words: "Did on the 3rd day of July, 1900, file a claimant's petition under said Kentucky Code provision, in the circuit court making himself a party to said action, having been directed so to do by the order of the referee in bankruptcy. A copy of said petition and exhibits attached thereto, including the said referee's order are filed as parts hereof, marked Exhibit No. 12. Thereafter on July 5, 1900, said trustee in bankruptcy tendered his proposed order for withdrawal of said fund accompanying the same with notice to petitioner's counsel and their response whereupon the court made him a party and entered the motion for leave to withdraw the funds then in said court, and sustained his motion and gave said trustee leave to withdraw, which was done. A copy of said motions or order and the notice to petitioner's counsel and their reply is filed as part hereof, marked Exhibit No. 13;" and Exhibit No. 13 therewith.

10. Also the words: "From all of which it appears that the trustee in bankruptcy became a party to the petitioner's suit for settlement in the State court, made it appear to said court that all its officers, including petitioner and his counsel were paid and the fund remaining in said court would be distributed among the creditor beneficiaries of said deed of assignment and thus obtained the said fund for distribution in bankruptcy herein. At the same time, whilst this was being done, the petitioner was under injunction from the district court herein as already shown, preventing any action on his part in said State court, and at the same time was being pressed by said show-cause rules of the referee in bankruptcy to surrender his commission and pay back the money expended by him in paying counsel before any bankruptcy proceedings, his re-

sponse to said rules, among other things, showing that the State court suit was pending and he was within that jurisdiction making his settlement."

And thereof prays judgment of the court.

TYLER BARNETT AND
AUGUSTUS E. WILLSON,
Solicitors for said Trustee.

56 Notice of the foregoing objections and motions by copy thereof delivered Feb'y 11th, 1901, is acknowledged and further notice waived.

——— ———,
Of Counsel for Leonard Comingor, Petitioner.

943. Motion to strike out. Filed Feb. 12, 1901. Frank O. Loveland, clerk.

United States Circuit Court of Appeals, Sixth Circuit, at Cincinnati.

SINSHEIMER, LEVENSON & COMPANY, FREEMAN Brothers, and N. Snellenburg & Co.
vs.
SIMONSON, WHITESON & Co. } In Bankruptcy.

Answer and Affidavit of the Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co.

The Louisville Trust Company, trustee in bankruptcy of the estate of Simonson, Whiteson & Co., bankrupts, for answer to the petition filed in the above-styled proceeding, and by way of affidavit for certiorari in the event that the petition should not be dismissed, states and deposes as follows:

Said trustee denies that nothing was alleged against said Comingor in the petition in involuntary bankruptcy, referred to in the petition filed herein, except that he was assignee for the creditors; denies the allegation in said petition for review that no further notice was taken of him in said bankruptcy proceeding or no action taken on his motion to dismiss or offer to answer, and states that said proceeding as to said petitioner remains in full force, and that the petitioner has never applied to the court to decide or dispose of his motion to file his answer therein or his motion to dismiss said proceeding as to him, or to offer to answer, and denies the allegation that in all proceedings subsequent to said motion to dismiss, he was simply dropped out of the case by common consent, or dropped out of it at all, and states he is still a

57 party to said proceeding, and the issues between him and the petitioning creditors in involuntary bankruptcy are not disposed of and have never been disposed of, and denies the allegation of petitioner that he was never treated or considered as a party to said bankruptcy proceedings by the court or the parties since March, 1899, in said district court, or that the orders, pleadings and records

will so show, and denies that the record in this court No. 716, page 20, paragraph 3, so shows, and denies that the order of the referee in bankruptcy on the 28th day of May, 1900, was without appearance of the petitioner, and states that at the time said order was made, said petitioner, L. Comingor, was represented before said referee by his attorneys, M. A., D. A. & J. G. Sachs, and denies that it appeared from his itemized account that he had, before any proceedings in bankruptcy, realized on all the assets of the bankrupts under direction and order of the State court or at all before any petition in bankruptcy, and denies that it showed that he drew as his commissions $3,398.90 or any other sum or paid his counsel for necessary services $3,200.00 before any proceedings in bankruptcy, or that it showed anything in regard thereto except that he had, as assignee under the assignment for the benefit of creditors in the State court, collected a large sum of money and had credited himself without any authority or order of court or permission so to do, with the sum of $3,398.90 commissions and $3,200.00 paid counsel. It did not show what the services of his counsel were, nor that they were necessary, much less that they were ever allowed by any court, or that there was any motion or proceeding to allow the same or any part thereof, or any authority therefor, except the entering of the same by himself in his own account, or that he ever held any of the money collected by him in any capacity or by any authority, except as such assignee, or that he ever had any personal title, claim or right to any of said money with which he charged himself in said account, or any right to retain the same or any part thereof until so ordered by the State court, and denies that the rule against the petitioner to pay the receiver the money retained by him, Exhibit No. 3, was made *sua sponte* by the referee, and denies that the order by the referee of June 28, 1900, Exhibit No. 9, was entered by the referee *sua sponte* or in any other way except upon the application of the trustee in bankruptcy, and denies that the petitioner, Leonard Comingor, is still subject to the jurisdiction of the State court or can be required to settle his accounts in
58 that court, and denies that it appears from the matters set forth in the petition for review or at all that the trustee in bankruptcy became a party to the petitioner's suit for settlement in the State court, or made it appear to said court that all its officers, including petitioner and his counsel, were paid or that the fund remaining in said State court would be distributed among the creditor beneficiaries of said deed of assignment, or that it was by making any such state of facts appear, that said trustee obtained said fund for distribution in bankruptcy herein, and denies that said trustee in its proceedings in the State court, made it appear to the State court, or that it did appear to the State court that petitioner and his counsel were paid, or that any representation or allegation was made in reference to the payment of petitioner or his counsel, and on the contrary, said trustee states that the attention of the State court was called by Mr. M. A. Sachs, then one of the members of M. A., D. A. & J. G. Sachs, attorneys in said proceeding in the State court for said Comingor, that the State court had not fixed any

allowance for the said Comingor as assignee, and his counsel, and the judge of the State court, the Hon. Emmett Field, then and there ruled and said in open court to petitioner, who was present in court, and his said counsel, that the State court, on account of the bankruptcy proceedings, would not consider nor decide upon any compensation for the petitioner, Leonard Comingor, or his said counsel, but that that matter must be disposed of by the bankruptcy court, but no entry of record was made thereof, because no application had been made by the petitioner, Leonard Comingor, or his said counsel, for any order making any fees or allowances to them, beyond the order referring the case to the commissioner, which was not executed nor carried out, and denies that the petitioner was, at the time of making of any of the orders by the referee in this proceeding, within the jurisdiction of the State court or making any settlement therein, or that the State court had any longer any jurisdiction of the settlement of the accounts of said Leonard Comingor, assignee, and states that said State court had expressly refused to take jurisdiction to settle said accounts, and had expressly ruled that the whole matter was within the jurisdiction and subject to the control of the said district court of the United States in said bankruptcy proceedings.

And the said trustee further states that said Leonard Comingor and his said attorneys, M. A., D. A. & J. G. Sachs, appeared in person and by counsel before the district court of the United
59 States and the referee in bankruptcy and submitted to the jurisdiction of said district court and referee in bankruptcy in all of said proceedings with reference to the payment by said Comingor into court of said moneys, which his accounts show he had received and retained without authority, and were represented by counsel therein in all of said proceedings, and applied to the court to allow said Comingor to retain said sums retained by him for his compensation and for that of his counsel, and cross-examined witnesses, and said Comingor testified upon said issues in his own behalf and produced the testimony of M. A. Sachs, D. A. Sachs and many other witnesses in his own behalf, and cross-examined witnesses for the trustee in bankruptcy, in which taking of testimony in said action, there was a great deal of time, work and expense incurred, a great number of witnesses examined and several hundred pages of depositions taken, filed and paid for, and the taking of all testimony and production of evidence upon said issues, both on behalf of said trustee in bankruptcy and the petitioner, Leonard Comingor, was finished and completed before the petitioner, Leonard Comingor, ever in any way objected to the jurisdiction of the said district court of the United States and referee in bankruptcy over said matters, and said trustee denies that this whole proceeding or any part thereof is illegal or in conflict with the provisions of the bankruptcy law; denies the allegation that neither the referee nor the district court has any jurisdiction of the petitioner or of the subject-matter in controversy, and states that no objection to the jurisdiction of said district court or referee was ever made until long after said Comingor had submitted to the jurisdiction of that

court and had applied to it to authorize him to retain said sums of $3,398.90 as his compensation and $3,000.00 which he alleged he had paid to said M. A., D. A. & J. G. Sachs, as attorneys.

The said trustee further deposes and states that the opinion of the referee accompanying the report, Exhibit No. 18, is material to the proper determination of this action, and has been omitted; and denies that the petitioner is justly aggrieved or is injured by said orders of the district court, and states that said court had jurisdiction of said Comingor, assignee, in said original petition in involuntary bankruptcy; that he was before the court therein and submitted to its jurisdiction, and tendered his answer and afterwards applied to said referee and district court to allow him said sums which he had collected and not paid into court, to wit: $3,398.90 and
60 $3,000.00 for his services and expenses as assignee under said assignment for the benefit of creditors.

Said trustee for further answer states that said Comingor never had any claim to any of said moneys collected or retained by him, except as assignee under the laws of the State of Kentucky, and under the orders and proceedings of said circuit court of the State of Kentucky, for Jefferson county, and no right or title to any of the moneys so collected, received or retained by him, as such assignee, in his personal right, nor had his attorneys any right thereto, or to any part thereof until allowed by the court having jurisdiction of the fund; that he had no right to retain anything on account of his compensation for his own services, or payment to his attorneys; that no order was ever entered authorizing him to retain any sum on account thereof, nor to pay any expenses except the expenses of carrying on the store and disposing of the property of the assigned estate, and that said State court, upon being advised by the transcript of the record, of said adjudication in bankruptcy, held and decided that it had no longer jurisdiction of said fund or any part thereof, except so much as was necessary to pay its clerk and commissioner, which was paid, and expressly refused to pass upon any question of any allowance to the said Comingor for his own compensation or for his attorneys' fees, and expressly ordered said Comingor, as it had the right to do, to submit to the judgment of the said district court in said bankruptcy proceedings upon said questions of his compensation and his attorneys' fees, and that it was in obedience to that requirement of the State court that he appeared in said bankruptcy proceedings after said trustee was appointed receiver, and subsequently trustee, and filed his account in the bankruptcy court before the register, with the items for his compensation, and his attorneys' fees, and applied to said district court and referee to allow the same and permit him to be credited with said amounts; that the State court has expressly refused to take jurisdiction of said questions of the compensation of said Comingor and his attorneys' fees, and declared that he must submit to the jurisdiction of said bankruptcy court in regard to said matters, and that said Comingor had no title in his own right to any of said money and no further right nor power to apply to the said State court for an allowance for his compensation or attorneys' fees, nor to any other court but the court

in bankruptcy, and that the said State court required him to submit to said bankruptcy court in said bankruptcy proceedings in the question of such allowance and that he had no right nor
61 title to said money nor any part thereof, and made no claim thereto except that as assignee of the trust fund, he requested the said court in bankruptcy to allow him said compensation, and that he was bound by said requirement of said State court to submit to said bankruptcy court in said proceedings said, claims for allowance for compensation and attorneys' fees.

Said trustee denies that said bankruptcy court erred in holding that the referee and said district court had jurisdiction and power to proceed against the petitioner, or that he was a third party, or anything but holder of the fund for the bankrupt firm and subject to the jurisdiction and control in regard thereto of the court having custody of said fund, and he denies that the court erred in holding that it had jurisdiction and power upon the proceedings, orders and recommendations of the referee, to adjudge said Comingor in contempt or order him to pay said money and punish him for contempt. Said trustee denies that said court erred in holding that the referee had jurisdiction and power to proceed against said Leonard Comingor in the summary manner, or in holding that said Leonard Comingor held said money for the bankrupts and could be proceeded against in such summary manner, or in holding that it had the power and jurisdiction to grant and issue the injunction against said Leonard Comingor, and said trustee states that said Leonard Comingor, petitioner, was before the court in said bankruptcy proceedings from the filing of the petition in involuntary bankruptcy, and service of the subpœna upon him therein; that the court took jurisdiction of him, and that he made no objection nor exception to the order of injunction against him referred to in his petition; and denies that the court erred in holding that said referee had the power or jurisdiction to issue said show-cause orders or rules thereon or proceedings against said Leonard Comingor in the manner had upon said orders issued; or that said district court erred in holding that the filing of the responses of said Leonard Comingor, gave said referee or court jurisdiction or power to proceed thereon, or that said referee and said district court erred in adjudging said responses and each of them insufficient, or in finding the facts to be or adjudging that said sums of money were the property of the bankrupts' estate, and that said Leonard Comingor never claimed title to any of it, nor made any claim of right to it, or ownership thereof at any time, and never claimed to have converted it to his own use, or to have claimed it adversely to the bankrupts or the trustee or the receiver in
62 bankruptcy, and states that said Comingor never did claim any title or right to any of said money, except as assignee of, and in that capacity agent of said bankrupt firm, and could not of right claim any part of it until such part should be set aside by some court having jurisdiction of the fund, which was never done, and had no right nor power to claim to have converted any part of it to his own use, or to have claimed it adversely to the bankrupts, or the trustee or the receiver in bankruptcy until allowed by some court

having jurisdiction of that fund, and no such allowance was ever made, and that said Comingor had no jurisdiction, authority, power or right whatever to retain or claim in his own right any part of the money held by him as trustee or assignee under said assignment for the benefit of creditors and subject to the court having jurisdiction thereof, nor any right nor claim to plead or assert or allege that any money held by him in such trust was converted to his own use, and denies that the district court erred in adjudging that said money was not converted by said Leonard Comingor to his own use, but was held for the benefit of the trustee, and denies that the court erred in adjudging that said Leonard Comingor was properly before the court in said proceedings, or in failing to dismiss said contempt proceedings against said Comingor, or in failing to discharge him, or in finding as a fact and adjudging that said Comingor was a party to this proceeding in bankruptcy, or in adjudging and ordering that said Leonard Comingor pay said sums of money to the receiver, afterwards the trustee, in bankruptcy, in the summary manner had, or after ordering said receiver and trustee to make itself a party to the State court proceeding, or after that was done, or after the receiver and trustee became a party to the State court proceeding and withdrew all the money paid into the State court by said Leonard Comingor.

Said trustee further states that the State court never made any order, decision or other proceedings dividing said money collected by said Comingor as assignee and reported in his accounts filed herein into any separate funds, nor did it order him to pay any of said money into court; but that his proceedings paying certain large sums of money into the State court, were taken and had by him, and said moneys paid in by him voluntarily without any order of the State court, in an effort to defeat the jurisdiction of said district court in bankruptcy, and that there never was any decision in the State court that in any way recognized or advised the State court of,

63 any division by said Comingor of said funds collected by him as assignee, or any retention of any part thereof by him on his own account or for his attorneys' fee, or any conversion of any part of said fund to his own use, or any distinction in the manner of holding the said trust fund or any part thereof by him, between the said sums which he now claims on account of his compensation and attorneys' fee, from any other part of the fund, or any determination or recognition in any way by said State court of any right or claim of said Comingor individually to any part of said fund, or any authority to expend any part of the same for his compensation or his expenses for attorneys' fee, or any recognition of any distinction or discrimination between the moneys said Comingor paid into said State court and the moneys which he did not pay in, and denies that said district court erred in holding that the proceedings therein against petitioner, Comingor, were equivalent to a plenary proceeding against him, or in holding that the acts or proceed-s therein by or in behalf of said Comingor, amount to or are equivalent to or constitute, a consent to the jurisdiction of the referee in bankruptcy and the district court therein under said proceedings against petitioner.

Said trustee further states that said petitioner, Leonard Comingor, before ever objecting or excepting in any way to the jurisdiction of said district court and referee in said bankruptcy proceeding over the said funds in his hands or over him and his said attorneys, M. A., D. A. & J. G. Sachs, gave his deposition in said proceeding on Sept. 16, 1899, for the defendants in said involuntary petition in bankruptcy, which is a part of the printed record, No. 777, in this court, at pages 53–63, inclusive, and that he engaged with his counsel in taking depositions upon the said issues with him herein, attending in person or by counsel at the following depositions:

At the deposition of C. M. S. Hebel, for the trustee, July 19, 1900, pages 1–5.

At his own deposition, for himself, July 19, 1900, pages 6–36, inclusive.

At deposition of M. A. Sachs, for said Comingor, July 19, 1900, pages 37–47, inclusive.

At deposition of W. F. Turner, for said Comingor, July 20, 1900, pages 48–60.

At deposition of Ben. C. Weaver, for said Comingor, July 20, 1900, pages 60–67.

At deposition of W. W. Watts, for said Comingor, July 20, 1900, pages 67–76.

64 At deposition of Leonard Comingor, July 24, September 24, 27th, 28th, October 1st and 2nd, 1900, being examined in behalf of Louisville Banking Company. He also attended, in person, or by counsel, at the following depositions:

At deposition of S. J. Spalding, July 24, 1900, pages 77–83.

At deposition of George Buechel, July 24, 1900, pages 83–90.

At deposition of Albert Schranz, July 24, 1900, pages 90–95.

At deposition of W. W. Webb, July 24, 1900, pages 95–97.

At deposition of Gus Rothenburger, July 27, 1900, pages 98–110.

At deposition of Samuel W. Botts, July 27, 1900, pages 111–113.

At deposition of D. A. Sachs, July 27, 1900, pages 113–132.

At deposition of Joseph Dinkelspiel, October 1, 1900, pages 134–141.

At deposition of Louis Dinkelspiel, October 1, 1900, pages 141–145.

At deposition of John A. Stratton, October 1, 1900, pages 145–147.

At deposition of Alex. Myers, October 1, 1900, pages 147, 148.

At deposition of Mark Sales, October 1, 1900, pages 149–162.

At deposition of Theodore Harris, October 2, 1900, pages 163–181.

At deposition of J. Lewis Williams, October 2, 1900, pages 181–'2.

At deposition of Frank B. Stouffer, October 2, 1900, page 183.

At deposition of R. W. Croxton, October 4, 1900, pages 184–'7.

At deposition of J. M. Andrew, October 4, 1900, pages 187–'8.

At deposition of R. B. Gelatt, October 4, 1900, pages 188–'9.

At deposition of S. S. Meddis, October 4, 1900, pages 190–'1.

At deposition of F. B. Stouffer, October 6, 1900, page 191.

At deposition of N. Bierman, October 10, 1900, pages 197–208.

At deposition of C. M. S. Hebel, October 10, 1900, pages 209–'10.

At deposition of S. M. Goldsmith, October 10, 1900, pages 210–221½.

65 At deposition of Theodore Harris, October 10, 1900, pages 222–230.

That it is necessary and material to the consideration and proper decision of this cause, and the petition of said Comingor for review herein, for the court to know all of the acts and doings of said Comingor in said proceeding before the said district court and referee in bankruptcy in order to show the fact and said trustee states that it is true that said Leonard Comingor, petitioner here for review, never made any application to any other court than said district court in bankruptcy for any allowance out of the funds which he held as assignee of Simonson, Whiteson & Co., for compensation for his own services, of those of his attorneys, and never had any allowance by any court therefor, and never had any title or claim to hold any of said moneys of said bankrupt firm collected and received by him in any capacity, except as assignee and trustee for the benefit of the creditors of said firm, and cannot claim here that he had converted or appropriated any of said funds collected, received or held by him as trustee, without applying to this court to believe him guilty of unlawful, wrongful and unpermitted misappropriation and conversion of said trust funds in his hands to his own use in order to defeat the jurisdiction of the said district court and referee in bankruptcy, and that he cannot plead or claim any adverse title or any personal right of any kind to any of said funds, which he now claims to have retained for his compensation and the compensation of his counsel, without pleading his own wrong and breach of trust in order to exclude the jurisdiction of the said district court and referee in said bankruptcy proceeding, and that he never did make any such claim or any claim that he had any right to retain any part thereof, or that the State court or any court had ever made him any order of allowance of any part thereof, nor did his said lawyers, M. A., D. A. & J. G. Sachs, make any such claim, but on the contrary his said lawyers expressly agreed before the referee that if the referee would not report them to the district court for failure to comply with the rule for them to pay in the $[illegible] that they would pay any order made against the assignee, Leonard Comingor, which they have heretofore failed to do, and that said assurance was given by said M. A., D. A. & J. G. Sachs, through M. A. Sachs, in the presence and with the permission of Leonard Comingor, petitioner herein, and said trustee, through its president, says that if a transcript of the record herein referred to, and especially the depositions hereinbefore named,

66 were filed as part of the appellate proceedings of the petitioner in this court, they would show the facts found by the referee, that the said petitioner had not managed the said estate faithfully nor for the best interest of the creditors, but had colluded and combined with the bankrupts and certain favored creditors of the bankrupts, to sell property of the bankrupt estate amounting to a great sum, to wit, $60,000.00, for the sum of $15,000.00, under an arrangement and agreement by which the favored creditors were to be paid fifty cents on the dollar, and the surplus of the proceeds of that operation after paying such creditors fifty cents on the dollar,

which was afterwards fixed at payment in full, should be divided between the bankrupts, and that after said arrangement was carried out, a large sum was divided among the bankrupts as profits of the wrecking of their business, and that the proceeding by which said remainder of the property of the said bankrupt firm was sold as a remnant, was made possible by the unfaithfulness of said assigned to his duty as trustee for the benefit of creditors to said bankrupt firm, and that the services of said assignee and his attorneys, instead of being beneficial to the estate, were in the highest degree injurious to the estate as shown in the report and opinion of the referee thereon. The following deposition- and parts of depositions are material and necessary for the proper determination and decision of the matters involved in the petition for review filed herein by said Leonard Comingor, all of which are about to be filed in this court, as a part of the transcript of the record on the appeal of D. L. Newborg & Son, and Stern, Falk & Co., creditors of said bankrupts, who filed their claims before said referee in said proceeding, and whose claims were disallowed by the referee, which action of the referee was approved and confirmed by the said district court in said proceedings, and will be part of the printed record in that proceeding, which could be read herewith when the same shall be printed, as there is no need of having them copied and printed twice, and all of said depositions and parts of depositions were produced and read before the referee and the court and considered by the referee and the court in the decision against said petitioner, Leonard Comingor, viz:

The deposition of Isadore Whiteson.

The deposition of L. Comingor, in his own behalf.

The second deposition of said L. Comingor, on the examination conducted in behalf of the Louisville Banking Company.

The deposition of M. A. Sachs.

67 The deposition of W. F. Turner.

The deposition of Ben. C. Weaver and W. W. Watts, for said Comingor.

The deposition of C. M. S. Hebel, for the trustee in bankruptcy.

The deposition of S. J. Spalding, for said Comingor.

The deposition of George Buechel, for said Comingor.

The deposition of Albert Schranz, for said Comingor.

The deposition of W. W. Webb, for said Comingor.

The deposition of Gus Rothenburger for said Comingor.

The deposition of Samuel W. Botts, for said Comingor.

The deposition of D. A. Sachs, for said Comingor.

The stipulation between counsel in taking those depositions, pages 46 and 133, and the following depositions for the trustee, to wit:

The deposition of Joseph Dinkelspiel.

The deposition of Louis Dinkelspiel.

The deposition of John A. Stratton.

The deposition of Alex. Myers.

The deposition of Mark Sales.

The deposition of Theodore Harris.

The deposition of J. Lewis Williams.

The deposition of Frank B. Stouffer.
The deposition of R. W. Croxton.
The deposition of J. M. Andrew.
The deposition of R. B. Gelatt.
The deposition of S. S. Meddie.
The deposition of F. B. Stouffer.
The deposition of N. Bierman.
The deposition of C. M. S. Hebel.
The deposition of S. M. Goldsmith.
The deposition of Theodore Harris.

Your petitioner further deposes and says that said Comingor has omitted the following parts of the record and proceedings before said district court in bankruptcy and said referee, which are necessary or material to a correct understanding, knowledge, decision and determination of the issues, which he asks this court by his petition herein to decide, namely:

The order of the referee, June 20, 1900, filing his report of receipts and disbursements.

He omits to state that during the proceeding before the referee, Mr. M. A. Sachs requested the referee not to report to the court his failure to comply with the rule against M. A., D. A. & J. G. Sachs, assuring the court that if Comingor was required to pay it, the Sachses would pay it for him.

68 He omits all of the depositions taken under the order of reference by the district court, made July 16, 1900, as follows: The depositions of Isadore Whiteson, some 93 pages, and exhibits of W. E. Ambrose, J. W. McGinn, Louis Zapp, A. N. Jamison, Jos. McGee, Albert Metzler, Geo. W. Harrington, C. M. S. Hebel, L. Comingor, M. A. Sachs, W. F. Turner, D. A. Sachs, Joseph Dinkelspiel, Louis Dinkelspiel, John A. Stratton, Theodore Harris, L. Lewis Williams, F. B. Stouffer, R. B. Gelatt, S. S. Meddie, N. Bierman, S. M. Goldsmith and others, with exhibits, which are too lengthy to be copied in time to file with this affidavit, but all of which were read on the hearing before the referee and the court on said rules.

He omits the order of the referee Nov. 23, 1900, filing stipulation as to evidence read and the stipulation itself.

He omits the order of the referee of November 24, 1900, submitting the case and giving two weeks to all parties to file briefs and two weeks' time to file exceptions to depositions.

He omits the motion entered November 24, 1900, before the referee by M. A. Sachs, to set aside the order of court requiring them to pay into court $3,000.00.

He omits the response of M. A., D. A. & J. G. Sachs, filed before the referee June 27, 1900.

He omits the certificate of the referee filed June 30, 1900.

He omits the referee's opinion filed with his report.

Wherefore, said Louisville Trust Company, trustee in bankruptcy, prays that the court will require said petitioner, Leonard Comingor, to supply said omitted parts of the record herein, or rather to file herein a complete transcript of the record of all of the pleadings, orders, proceedings and evidence in said district court and before

said referee in bankruptcy in the matter of said proceedings against Leonard Comingor, assignee, and further prays that the petition for review herein be refused and dismissed at the petitioner's cost and for its costs and all proper relief.

TYLER BARNETT AND
AUGUSTUS E. WILLSON,
Attorneys for the Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Company.

STATE OF KENTUCKY, } ss:
County of Jefferson, }

H. V. Loving makes solemn oath and says that he is president of the above-named corporation, The Louisville Trust Company,
69 trustee in bankruptcy of Simonson, Whiteson & Co., bankrupts, defendant to the petition of Leonard Comingor, referred to in the foregoing answer and affidavit for a writ of certiorari for diminution of record, and that the foregoing answer and affidavit is not interposed for delay and the same is true in point of fact.

H. V. LOVING.

Sworn to and subscribed before me this 11th day of February, A. D. 1901. My commission expires Jan'y 27, 1902.

[SEAL.] NORA KIRCH,
Notary Public in and for Jefferson County, Kentucky.

I hereby certify that in my opinion the foregoing answer and affidavit for a writ of certiorari for diminution of record is well founded in point of law.

____ ____,
Of Counsel for Defendant to the Petition.

943. Answer and affidavit. Filed Feb. 12, 1901. Frank O. Loveland, clerk.

70 And afterwards, to wit, on February 12th, 1901, a motion to advance, etc., was filed, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

In the Matter of Bankruptcy of Sinsheimer, Levenson & Co. *vs.* Simonson, Whiteson & Co.	Petition of Leonard Comingor for Review.

Motion.

Come- petitioner, Leonard Comingor, by his attorneys, D. A. Sachs and Wm. M. Smith, and files notice and moves the court to advance the hearing of this petition for review to such a day in the present February term of this court as may suit its convenience, and to grant a hearing thereon as speedily as possible and submission

thereof, and to make such orders as the court may deem necessary to suspend the execution of the judgment entered in the district court of the United States for the district of Kentucky in this case, on January 26th, 1901, requiring said petitioner, Comingor, to pay to the Louisville Trust Company, trustee in bankruptcy herein, $3,398.90 and $3,000 on or before February 16, 1901, until the matter comes to be heard by this court and determined herein.

United States Circuit Court of Appeals for the Sixth Circuit.

In the Matter of Bankruptcy of Sinsheimer, Levenson & Co. *vs.* Simonson, Whiteson & Co.	Petition of Leonard Comingor for Review.

Notice.

71 Hon. Augustus E. Willson, attorney for Louisville Trust Company, trustee for Simonson, Whiteson and Company:

You are hereby notified that in the court-room of this court, at Cincinnati, Ohio, on Tuesday, February the 12th, 1901, at the opening of the said court or as soon thereafter as counsel can be heard, I will, through my counsel, move this court to enter an order herein advancing the hearing of the petition for review filed herein in this court by me on January 28th, 1901, a copy of which has been heretofore furnished you, to such a day in the present February term as suits the convenience of the court, and that on the day fixed by the said court a hearing may be then granted thereon and a submission thereof had, and I will, through my counsel, at the same time and place, move this court for an order suspending the execution of the judgment entered in the district court of the United States for the district of Kentucky on January 26th, 1901, requiring me to pay to said Louisville Trust Company, trustee in bankruptcy herein, the sum of $3,398.90 and $3,000 on or before February 16th, 1901, and for such other and further orders as this court shall deem meet and proper and shall grant, suspending all proceedings against me in said district court of Kentucky in this matter pending this petition for review and until the further order of this court.

LEONARD COMINGOR,
By M. A., D. A., & J. G. SACHS AND
W. M. SMITH, *His Attorneys.*

Executed on Augustus E. Willson, attorney for Louisville Trust Company, trustee for Simonson, Whiteson & Co., on February 5th, 1901, at 9½ o'clock a. m., by delivering to him in person a
72 true copy of the within notice. I am personally acquainted with said Willson. I am a citizen of the United States. I am not of kin to any of the parties and am not interested herein.

EDWARD C. MUMPHRIE.

Subscribed and sworn to before me by Edward C. Mumphrie this 5th day of February, 1901.

My commission expires January 6th, 1904.

D. A. SACHS,

[SEAL.] *Notary Public in and for Jefferson County, Kentucky.*

And on the same day, to wit, on February 12th, 1901, an order was entered in said cause, which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

SINSHEIMER, LEVENSON & Co. *vs.* SIMONSON, WHITESON & Co. } Petition of Leonard Comingor for Review.

Comes petitioner Leonard Comingor, by his attorneys, D. A. Sachs and W. M. Smith, and filed notice and files and enters motion and moves the court to advance the hearing of this petition for review to such a day in the present February term of this court as may suit its convenience, and to grant a hearing thereon as speedily as possible and a submission thereof, and to make such orders as the court may deem necessary to suspend the execution of the judgment
73 entered in the United States district court at Louisville herein on January 26, 1901, requiring petitioner Comingor to pay the Louisville Trust Co., trustee herein, $3,398.90 and $3,000 on or before February 16th, 1901, until the matter herein on review may be heard and determined herein by this court, and the trustee, by Augustus E. Willson, attorney, filed notice and motion referred to therein objecting to petitioner's motion and moving to dismiss the petition on grounds set up in the motion, and also to strike out parts of the petition, and also answer and affidavit of said trustee for a writ of certiorari for diminution of the record, and move- the court to grant it said writ.

Thereupon it is ordered and adjudged by this court that the judgment rendered in the district court of the United States for the district of Kentucky, at Louisville, Kentucky, on January 26, 1901, requiring the petitioner, Leonard Comingor, to pay to the Louisville Trust Co., trustee in bankruptcy herein, the sum of $3,398.90 and $3,000 on or before February 16th, 1901, and all proceedings in said district court pending as against said Comingor on said matter be, and the same is hereby, stayed and suspended until the further orders of this court.

And it is ordered by the court that said trustees shall have until Monday, February 18, 1901, to print its said motion, answer, and affidavit, and this order and time is hereby given both petitioner and defendant in error until the day of the hearing of the petition on review to file briefs on said review.

And afterwards, to wit, on February 15th, 1901, the affidavit of Leonard Comingor was filed, clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

SINSHEIMER, LEVENSON & COMPANY
vs.
SIMONSON, WHITESON & COMPANY. } Affidavit.

In the matter of the petition of Leonard Comingor to review an order of the district court of the United States for the district of Kentucky.

The petitioner and affiant, Leonard Comingor, says on oath that his insolvency, as shown in his responses on pages 18 and 21 of this record, still exists, and he says that he is utterly unable to comply with the judgment of the district court requiring him to pay to the Louisville Trust Company, trustee herein, the sums of $3,398.90
74 and $3,000 or either of said sums or any part thereof. He says that he has no means and no possible way by or from which he could raise the money to pay said trustee or bring it into court, and all of this because of the great financial embarrassment under which he is now laboring. He says he is unable on account of his poverty, want of assets, and financial embarrassment aforesaid to give security for the money or execute any bond for a stay of these proceedings against him or to execute a supersedeas bond herein.

LEONARD COMINGOR.

STATE OF KENTUCKY, } *sct:*
County of Jefferson, }

I, Edward C. Mumphrie, a notary public in and for the county and State aforesaid, do hereby certify that on this day the foregoing affidavit was subscribed and sworn to before me by Leonard Comingor. My notarial commission expires at the expiration of the next senate of Kentucky.

In testimony whereof witness my signature and official seal this 14th day of February, 1901.

EDWARD C. MUMPHRIE,
[SEAL.] *Notary Public in and for Jefferson County, State of Kentucky.*

And afterwards, to wit, on February 23, 1901, an order was entered in said cause, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

In the Matter of the Petition of LEONARD COMINGOR.

Before Lurton & Severens, JJ.

The motion in this cause to advance the same for hearing
75 is granted, and is set as the second cause for hearing at the March session.

The motions to dismiss the petition and to add to the record are both denied.

And afterwards, to wit, on March 5th, 1901, an entry was made upon the journal of said court in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

In the Matter of the Petition of LEONARD COMINGOR.

Before Judges Lurton, Severens, and Clark.

This cause is argued on behalf of the petitioner by Mr. Wm. M. Smith, and for the defendant by Mr. Augustus E. Willson and submitted.

And afterwards, to wit, on April 2nd, 1901, a decree was rendered in said cause, which reads and is as follows:

Decree.

76 United States Circuit Court of Appeals for the Sixth Circuit.

In re COMINGOR. No. 943.

Petition to review an order in bankruptcy by the district court of the United States for the district of Kentucky.

This cause came on to be heard on the petition to review an order of the district court of the United States for the district of Kentucky and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the order and decree of the said district court in this cause confirming the orders of the referee requiring this petitioner to pay the trustee the sums of $3,398.90 and $3,000 respectively be, and the same is hereby, reversed with costs with directions to said district court to set aside said order and decree, and that the orders of the referee making absolute the orders made by him directing the petitioner Comingor to pay the trustee in bankruptcy the moneys mentioned in said orders so confirmed, as aforesaid, be vacated and set aside.

77 And afterwards, to wit, on April 10th, 1901, an opinion was filed in said cause, which is clothed in the words and figures as follows:

Opinion.

78 United States Circuit Court of Appeals, Sixth Circuit.

SINSHEIMER, LEVENSON & COMPANY
v.
SIMONSON, WHITESON & COMPANY, *ex Parte* LEONARD COMINGOR. } No. 943.

Petition of Leonard Comingor for the review of certain orders of the district court of the United States for the district of Kentucky.

Submitted Mar. 5, 1901; decided April 2, 1901.

Before Lurton and Severens, circuit judges, and Clark, district judge.

This petition for review relates to a case in bankruptcy which has been twice before this court upon appeals which concerned the adjudication of Simonson, Whiteson & Company as bankrupt. 95 Fed., 948, and 100 Fed., 426. The adjudication was made on the 20th day of September, 1899. The ground thereof was that Simonson, Whiteson & Co. had within four months preceding the filing of the petition made a general assignment under the statutes of Kentucky for the benefit of creditors to Comingor, the present petitioner for review. Comingor, who was made a party to the petition for the adjudication, tendered an answer, which appears never to have been filed. The reason for not permitting it to be filed does not very clearly appear. Upon the order adjudging the company bankrupt being made, the matter was referred to a referee. The Louisville Trust Company was appointed receiver, and was directed by the court to apply to the Jefferson circuit court, a State court of Kentucky, which had charge of the proceeds of the assigned prop-
79 erty already converted into money under the direction of that court, for an order to pay over to the receiver the funds so in its hands.

On a day prior to the making of this order, the bankruptcy court made another order on the bankrupts and on Comingor "and all persons to whom notice may come" enjoining them "from taking any steps, instituting or having any proceedings affecting the estate and assets of Simonson, Whiteson & Co. in any State court, and especially in action No. 19944—pending in Jefferson circuit court," the case mentioned being the one in which the assignment was being administered. The trust company was allowed by the State court to become a party to the action and leave was granted to file its petition for the purpose aforesaid. This petition recited the proceedings in the bankruptcy court up to that time, including the injunction restraining the bankrupt, Comingor and others, and made claim to the fund. The attorney for the trust company served notice of the intended presentation of the petition upon the bankrupt and upon Comingor. The latter conceiving himself bound by

the injunction, interposed no objection. On the 30th day of June, 1900, the petition was granted and the funds turned over.

Meantime, on May 28, 1900, the court made the following order:

"In the Matter of SINSHEIMER, LEVENSON & Co., ETC.,
vs.
SIMONSON, WHITESON & Co., D. G. SIMONSON, I. WHITESON, and Leo Stern, Bankrupts.

"At Louisville, in said district, on the 28th day of May, A. D. 1900, before John B. Baskin, referee in bankruptcy.

"No notice having been given, and no adverse interest appearing it is hereby ordered that L. Comingor file with John B. Baskin, one of the referees of this court in bankruptcy, at his office, rooms 1001–5, Columbia building, Louisville, Kentucky, on or before June 16, 1900, at 9.30 o'clock a. m., a detailed and itemized statement showing all the receipts and disbursements made by him of money and other assets belonging to the estates of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, together with all vouchers that he may have for any disbursements.

"It is further ordered that said L. Comingor be and appear before the referee aforesaid in person on June 16, 1900, at 9.30 o'clock a. m., for the purpose of making settlement of his accounts as assignee of the parties aforesaid."

80 Not long thereafter Comingor presented the statement of account thus ordered. It showed his receipts to be $92,865.77, and his disbursements $86,099.24, showing a balance of $6,766.53 remaining in his hands. Among the disbursements were $3,000 paid to one attorney, $200 to another, and $3,300 to himself. On June 20, 1900, the referee made an order which includes the beginning of the proceedings now more particularly under review. So much of it as relates to the particular subject reads as follows:

"In the District Court of the United States for the District of Kentucky. In Bankruptcy.

"In the Matter of SINSHEIMER, LEVENSON & Co., ETC.,
vs.
SIMONSON, WHITESON & Co., D. G. SIMONSON, I. WHITESON, and LEO Stern, Bankrupts.

* * * * * * *

"Said receiver is further authorized and directed to take charge of and hold until further orders of court all the assets of whatsoever kind and estates of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, and also to receive from D. Sachs the sum of $3,000, and from L. Comingor $3,398.90, and also from said Comingor the further sum of $6,766.53, and also from Zack Phelps the sum of $200.

"It is further ordered that said D. Sachs, L. Comingor and Zack Phelps be and appear before John B. Baskin, one of the referees of

said court in bankruptcy, at his office in the Columbia building, Louisville, Kentucky, on June 23, 1900, at 9.30 o'clock a. m., to show cause, if any they can, why they shall not be required to pay over to said receiver the sums aforesaid."

June 23, 1900, Comingor made the following response:

"SINSHEIMER, LEVENSON, ET AL.
vs.
SIMONSON, WHITESON, ET AL.

"Before Hon. John B. Baskin, referee.

"L. Comingor for response herein to the order to pay $3,398.90, says that, as shown in his report herein, he retained the same on account of his commissions as assignee before any bankruptcy proceedings, relying upon the fact that he would be entitled to more than that sum on final settlement; that for the services ren-
81 dered the estate herein he believes this honorable court will, on a full hearing, allow him at least said amount; that he is a man of no means, has used of said money from time to time, relying upon its being his, until he has none of it left. He says that he is unable to pay said money into court, having neither money or property of any kind. He says that he has recently made efforts to borrow or raise money and finds it impossible to do so. He asks the court for such relief in the premises as the court deems proper.

L. COMINGOR.

"Subscribed and sworn to before me by L. Comingor, June 23, 1900. My commission expires January 6, 1904.

"MORRIS A. SACHS,
"*N. P., Jeff. Co., Ky.*"

Upon the filing of this response the referee made the following determination:

"In the Matter of SINSHEIMER, LEVENSON & CO., ETC.,
vs.
SIMONSON, WHITESON & CO., D. G. SIMONSON, I. WHITESON, and Leo Stern, Bankrupts.

"At Louisville, in said district, on the 23d day of June, A. D. 1900, before John B. Baskin, referee in bankruptcy.

"No notice having been given, and no adverse interest appearing, comes L. Comingor, by M. A. Sachs and Alex. P. Humphrey, his counsel, and files herein a response to the rule to show cause why he should not be compelled to pay $3,398.90 to the Louisville Trust Company, receiver in bankruptcy in this cause, and after hearing said counsel it is now ordered and adjudged that said response be, and the same is, hereby held insufficient, and the rule to show cause why he should not pay said sum as aforesaid is hereby made absolute. It is further ordered that said L. Comingor shall pay to the

Louisville Trust Company, receiver in bankruptcy, by 9.30 o'clock a. m., on Saturday, June 30, the said sum of $3,398.90.

"JOHN B. BASKIN,
"*Referee in Bankruptcy.*"

For some reason, not appearing in the record, the order to show cause made on the attorneys was not pursued, but on the 28th of June, 1900, another order was made on Comingor to show cause why he should not be required to pay to the receiver, the sums of money shown by his account rendered to have been paid to Sachs and Phelps, $3,200 in all. This order after having been entitled as before was in the following terms:

82 "At Louisville, in said district, on the 28th day of June, A. D. 1900, before John B. Baskin, referee in bankruptcy.

"No notice having been given and no adverse interest appearing, it is ordered that L. Comingor be and appear before John B. Baskin, one of the referees in bankruptcy of the above court, at 9.30 o'clock a. m. on June 30, 1900, to show cause, if any he can, why he shall not be required to pay to the receiver in bankruptcy herein the sum of $3,000 recited in his report as having been paid to M. A., D. A. & J. G. Sachs, and also the further sum of $200 recited in said report as having been paid to Zack Phelps.

"JOHN B. BASKIN,
"*Referee in Bankruptcy.*"

Under the same title Comingor, on June 30, 1900, made the following response:

"L. Comingor, for response to the order herein to show cause why he shall not pay the receiver in bankruptcy herein the sum of $3,000 shown in his report as having been paid Messrs. M. A., D. A. & J. G. Sachs, and $200 to Zack Phelps, Esq., says that said sums were paid them, respectively, for services rendered him as his counsel whilst acting as assignee before any proceedings herein, as already appears in his report herein. He says further that he has no money or property or means of any kind with which to pay said money or any part thereof, and refers to his former response herein as part hereof.

"He respectfully submits to the court that he ought not to be compelled to pay said money herein.

"This respondent says, further, that long before the petition in this proceeding was filed and before he had any knowledge, information or intimation that it was intended to be filed, and relying upon it that he would be permitted to wind up his trust under the deed of assignment for the bankrupts shown in the record in this action of proceeding, he filed his petition and brought his action in the State court as appears in this record, which is still pending, and he is still subject to the jurisdiction and orders of said State court requiring him to settle his accounts there and to be responsible there for all his acts and doings under said deed of assignment.

"He submits to this honorable court that this response be held

sufficient, and that the 'show-cause' order herein should be annulled or suspended until he is relieved from his present embarrassing position.

"L. COMINGOR."

The foregoing response was sworn to. It was also adjudged insufficient by the referee. The rule was made absolute, and Comingor was ordered to pay to receiver the $3,000 which he alleged he had paid the Sachs as attorneys. Thereupon Comingor prayed
83 for a review by the judge of both the orders adjudging his responses insufficient and ordering him to pay to the receiver the said sums of $3,398.90 and $3,000, respectively. In his report to the judge the referee stated his findings to be that Comingor was entitled to no compensation whatever, and that his retention of the sum of $3,398.90 was unwarranted; and, further, that he had no legal right to pay attorney fees, when no allowance had been made by the State court therefor, and in contemplation of law the assignee must be deemed to have the funds in his possession. The referee concluded his report by saying, "These proceedings are now certified to the judge to deal with said Comingor for disobeying said rules to pay the two sums aforesaid." Pending the action of the court on this report, the judge referred the case back to the referee to take testimony and report what services and the value thereof Comingor had rendered to the estate before the petition in bankruptcy was filed, what services and their value he had rendered since the filing of the petition; what services, their necessity and value, the attorneys had rendered to the assignee, together with any modification he might choose to make of his former report and recommendation.

Upon this reference the receiver (who at some date not shown by the record had been converted into a trustee) and Comingor appeared. Proofs were offered by the parties and a stipulation entered into that a certain deposition which had been theretofore taken should be read and that the printed records of the former appeals to this court should be considered on the reference.

On December 11, 1900, the referee reported the evidence which he had taken and his conclusions thereon, that neither Comingor nor his attorneys had rendered services of value to the estate, but that their dealings with it had been injurious to the creditors, and that nothing should be allowed therefor. He stated, however, that the sum paid to the attorneys was "usual and reasonable according to the scale of compensation allowed for such services by the State court in Louisville." In conclusion the referee stated that he made no modification of his former report.

While this reference was pending, and on November 10, 1900, Comingor tendered an amended response which he offered to file, the substance thereof being as follows:

"Leonard Comingor amends his response herein to the orders to pay $3,398.90 and $3,000.00, and for amendment says that as shown by the pleadings, record and evidence in this case taken and
84 the entire proceedings had herein, neither this court nor the referee in bankruptcy herein has any jurisdiction, either

of this respondent or the matter involved, to make any such orders or require respondent to answer thereto, because he says the records herein show that all transactions with reference to said two (2) sums of money took place before the petition in bankruptcy was filed herein, and that neither this court nor the referee in bankruptcy can proceed against this respondent as herein attempted by order or rule to pay or by summary process."

And he prayed "that said rule be discharged and said orders to pay be set aside." This response the referee declined to entertain, and it was again tendered on the filing of the referee's report. The judge in confirming the report of the referee, held in respect to the amended response that though in fairness the claim of lack of jurisdiction might be referred to November 10, 1900, the date when it was tendered to the referee, it should not be entertained by the court for the reason that by long acquiescence in that mode of *procedure*, the respondent should be regarded as having consented thereto. Thereupon, the judge directed the entry of the following order:

"In the Matter of SINSHEIMER, LEVENSON & Co., etc.,
vs.
SIMONSON, WHITESON & Co., D. G. SIMONSON, I. Whiteson, and Leo Stern. } In Bankruptcy.

"This cause coming on to be heard on the petition of Leonard Comingor, for review of the order of court entered herein by John B. Baskin, one of the referees of this court, requiring Leonard Comingor to pay over to the Louisville Trust Company, trustee in bankruptcy, herein, the sums of $3,398.90 and $3,000.00, and the court being fully advised, delivered a written opinion which was filed herein, and on January 19, 1901, and in pursuance of said written opinion, it is considered, ordered and decreed by the court that said petition for review filed by said Comingor, June, 1900, is refused and dismissed, to which said Comingor excepts, and it is adjudged and ordered by the court that said Comingor pay to said Louisville Trust Company, trustee, the said sums of $3,398.90 and $3,000.00 on or before February 16, 1901, to all of which said Comingor excepts."

Comingor then filed this petition for review.

85 SEVERENS, circuit judge, having made the foregoing statement, delivered the opinion of the court:

We have made a somewhat detailed statement of the course of proceedings in the case, in order to show the relation of the petitioner thereto, for it was upon the ground of the petitioner's implied consent to the mode adopted that the district judge justified it. We have only to review the orders of the referee in holding the responses made by this petitioner to the referee's orders to show cause why he should not be required to pay over the sums of $3,398.90 and $3,000, respectively, to the trustee, and his recommendation that the respondent be dealt with for his contempt in not complying therewith, and the judge's order confirming the same.

The two principal questions presented are, first, whether the petitioner was precluded from objecting to the form of procedure, and, second, if he was, whether it was properly pursued. It is contended in behalf of the trustee that Comingor was made a party to the petition for adjudication and that having thus been brought in he continued to be subject to the orders of the court without other process. But it appears that no special relief was prayed against him and it is manifest that the only legitimate object in making him a party was to enable him to contest the adjudication, the result of which might be to prejudice his rights as assignee. The bankruptcy act contains no specific provision authorizing such joinder of a third person in the petition for adjudication.

But the circuit court of appeals for the second circuit held, *In re* Meyer, 98 Fed., 976; 39 C. C. A., 368, that the assignee was entitled to intervene for the protection of his interest, but if that be so, it would not follow that he might be made a party by the petitioner. The object of the petition is not to finally litigate and determine adverse claims, certainly not to predetermine those questions which in due course remain to be determined in the usual course of administration, in case the bankruptcy is adjudged. If the assignee for the benefit of creditors is a proper party to the preliminary proceeding it can only be for the purpose of contesting one of the facts which would give his adversary ground for hostile proceeding, namely, the bankruptcy of the party proceeded against and the consequent investment of the bankrupt's title in the trustee. The only issue presented by the petition is whether the respondent is in such plight or has committed such an act as subjects him to the
86 operation of the bankrupt law, and all inquiry into other questions is *pro hac vice* only. Smith *v.* Belford, a case recently decided by this court. 106 Fed. It would be an anomalous result if the creditor by naming the assignee as a party to the petition for an adjudication and praying a subpœna for him could thereby bring him into the case for the purposes of all future inquiries and determinations to be made in the progress of the case. Such practice would be a clever device for defeating the right of the assignee to have his title ascertained and determined by the proper court and in a customary mode of proceeding. We are of opinion that the act cannot be construed as making the petitioning creditor able to thus subvert the rights of an adversary, and that Comingor was not, by reason of his having been made a party to the original petition in bankruptcy, precluded from his right to object to having the question of his obligation to pay the moneys specified in the order to show cause determined in that summary way. The character of the proceedings as shown by the record lacked the usual characteristics of a judicial proceeding. There was no petition by the trustee or other party stating any facts or presenting any issue, and it is not shown to have been made on the motion of any one. The inference reasonably to be drawn is that the referee perceiving these items in Comingor's statement of account, and thinking they were probably objectionable, *ex mero motu* made the orders to show cause why Comingor should not be required to pay them,

notwithstanding his claim to have appropriated the money in payment of his own fees or in payment for the services of his attorneys. It is fair to say as we did in Smith *v.* Belford, that these proceedings took place when the bankruptcy courts were many of them acting upon an interpretation of the law in respect to the use of summary proceedings, which has since been determined by the Supreme Court in the case of Bardes *v.* Hawardin Bank, 178 U. S., 524, to be wholly inadmissible.

But the district judge puts his conclusion upon the ground that the petitioner had acquiesced in the course pursued by making response to the orders asking to be relieved in the premises and going into proof before the referee and making stipulations concerning the proofs on the reference.

If his objection which he subsequently made and now insists upon does not so far concern the jurisdiction of the court as to render it not susceptible of waiver we should think there was some ground for that conclusion.

But it may well be doubted whether such a proceeding
87 is due process of law in such circumstances. Comingor had been ousted of his trust, and the question was that of his obligation to pay certain moneys alleged to be in his hands belonging to the trustee. By the remedy pursued he was deprived of his right to a trial by jury. The determination by the referee upon the facts would not be subject to appeal or writ of error. The judgment would not be enforced by execution, but by process for contempt. The proceeding when employed for such a purpose is in the nature of a civil remedy for the recovery of money. Quite generally, if not universally, State statutes founded on public policy forbid imprisonment as a remedy to compel the satisfaction of debts or other obligations not founded on wilful wrong, and this policy may not be countervailed by the consent of parties to a proceeding which results in defeating it. And such statutes are given effect in the courts of the United States by Rev. Stat., sections 990, 991.

Mallory Mfg. Co. *v.* Fox, 20 Fed., 409, per Wallace, C. J.; Low *v.* Durfee, 5 Fed., 256, per Lowell, C. J.; *Ex parte* Hooson, Law Rep., 8 Ch. App., 251.

The question of remedies is involved in that of jurisdiction. The remedy must have some reasonable fitness to the relief sought. Thus in an action of assumpsit the defendant could not be condemned for a trespass, nor in an action of ejectment could a judgment for money be recovered, nor could a proceeding for a mandamus be employed for the mere recovery of a debt. In an action at law one cannot obtain merely equitable relief; nor could a bill in equity be maintained on a purely legal cause of action. Nor would the appearance of the defendant and his contestation of the suit without objection to the jurisdiction authorize such judgment as in these instances is mentioned. And if, in any such case, the judgment or decree be not wholly void, it is at least subject to correction by appeal or writ of error in that suit. In the case of Marshall *v.* Knox, 16 Wal., 551, a case cited in that of Bardes *v.* Hawardin Bank, the assignee of the bankrupt claimed as assets certain prop-

erty in the hands of a sheriff taken on a writ of provisional seizure for rent due the lessor of the bankrupt. The assignee obtained from the bankruptcy court a rule upon the sheriff and the lessor to show cause why they should not deliver up the property to the assignee, alleging that it was necessary to enable the court to administer the claims of creditors. The lessor, without objecting, so far as appears, to the jurisdiction of the court, contested this rule, stating his own rights and proceedings, and claimed possession of the property through the sheriff
88 for the purpose of selling the same to raise the amount due for rent. But the rule was made absolute without further proof. He prayed an appeal which was not allowed. Thereupon he filed a bill in equity in the circuit court under the second section of the bankruptcy act of 1867, to enjoin the assignee from taking possession of the property under the order of the bankruptcy court, and for a decree that they should not molest him in his proceedings to collect the rent. He was denied the relief he sought by the circuit court and he, thereupon, appealed to the Supreme Court. Mr. Justice Bradley, in delivering the opinion of the court, after reciting the facts, stated the question to be whether the bankruptcy court had any authority to make the rule to show cause above mentioned, and as bearing upon that inquiry whether such a rule could be characterized as due process of law. After discussing the provisions of the act in reference to remedies and the prejudice to defendants of summary proceedings, he said, "We think it could not have been the intention of Congress thus to deprive parties claiming property, of which they were in possession, of the usual processes of the law in defense of their rights."

And he stated the conclusion of the court in the following language: "The court is of opinion, therefore, that the district court proceeded without jurisdiction in compelling the lessor and the sheriff under a rule to show cause to deliver up possession of the goods in question to the assignees. It results that the bill in this case was properly filed as an original bill," etc. The decree of the circuit court was reversed with directions to grant the equivalent of the relief prayed. We have stated this case thus fully because it shows that the question involved is one of jurisdiction and that the party complaining of its exercise is not precluded from his objection by having contested a rule to show cause made by the bankruptcy court. It should be observed in this connection that the consent mentioned in section 23*b*, means consent to the tribunal in which the controversy is to be carried on, and not to the mode of procedure, which is regulated by general principles of law unless other provision is made. Under the second section of the act of 1867, the circuit court was given a somewhat similar power of superintendence, though by different methods, over the proceedings in the bankruptcy court, to be exercised "upon bill, petition, or other proper process," to that conferred upon the circuit courts of appeal by section 24*b* of the act of 1898. We are, therefore, inclined to
89 think that this petitioner was not precluded from his right to raise the objection to the mode of proceeding at the time

he did, which was before the making of the final order, and that the court erred in refusing to entertain it. His contestation of the order and his prayer for relief were substantially the same as those of the respondent in the rule to show cause in the case of Marshall *v.* Knox above cited. And we think he was no more subject to the control or jurisdiction of the court for the purposes of the proceeding than was the respondent to the rule in that case.

But, however this may be, we think upon any view of the lawfulness of the method of procedure adopted, the referee, and the court in confirming his order, erred in holding that the responses to the orders to show cause were insufficient. The action of the referee assumes that the facts were as stated by the respondent. These were that as to the item of $3,398.90 the respondent had retained those moneys as his commission as assignee in reliance upon the belief that he was entitled to that amount on final settlement, that he had used the money, relying upon its being his, until he had none of it left, that he is a man of no means, having neither money nor property of any kind, that he is unable after endeavoring to borrow or raise money to pay the same into court. With respect to the $3,000 paid to the Sachs, his attorneys, it was paid while they were acting as counsel for him, before the bankruptcy proceedings were commenced, for their professional services rendered to him as assignee. And with respect to the ability of the respondent to pay the money the same facts exist as with respect to his ability to pay the other sum. The referee was of the opinion that the respondent was not entitled to any compensation whatever, and that he had no legal right to pay fees to his counsel without an allowance therefor by the State court, and that, therefore, he "must be deemed to have the funds in his possession." The court ordered a reference for a further report in regard to the question whether the respondent was entitled to any compensation for his services as assignee, and whether the counsel were entitled to any. But no question was referred touching the fact that the respondent had retained and spent the money he claimed to be due him for his compensation, or the fact that he had paid the sum mentioned to his counsel, or the ability of the respondent to refund the moneys. The confirmation by the court affirmed the insufficiency of these facts to excuse the respondent from paying over the money, and the court, thereupon, ordered
him to pay it before a day named. With these adjudications
90 behind him there was nothing to follow but imprisonment,
from which there could be no prospect of relief but by reiteration of the same facts which would be unavailing. But it is well settled that a showing made by a respondent that he is unable to do an act required of him upon an order to show cause is a sufficient answer. It matters not for the purpose of such a proceeding that the inability to do the thing required may be in consequence of his own fault arising from a mere misconception of his rights or committed before the court took jurisdiction of the matter; the court cannot compel an impossibility. Hendryx *v.* Fitzpatrick, 19 Fed., 810, 814, per Lowell and Nelson, judges; *In re* Chiles, 22 Wal., 157,

168; Loveland on Bankruptcy, sec. 239; Kane *v.* Haywood, 66 N. Car., 1.

Other remedies may exist for punishing the petitioner, if there is ground for it, or for establishing a civil liability if the necessary facts exist.

The result is that the orders of the referee adjudging the responses of the petitioner insufficient and the order of the court confirming the same must be set aside.

91 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record in the case entitled *In the matter of the petition of Leonard Comingor to review an order of the district court of the United States for the district of Kentucky*, No. 943, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at the city of Cincinnati, Ohio, this 24 day of May, A. D. 1901.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

92 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the sixth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit entitled In the matter of the petition of Leonard Comingor to review an order of the district court of the United States for the district of Kentucky, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme
93 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 15th day of May, in the year of our Lord one thousand nine hundred and one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

United States Circuit Court of Appeals for the Sixth Circuit.

Pursuant to the command of the within writ of certiorari, I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do herewith transmit, under the seal of the said court, a true, full, and complete copy of the proceedings in said court in the cause and matter in the said writ of certiorari stated, together with all things concerning the same, to the Supreme Court of the United States, together with said writ of certiorari.

Seal United States Circuit Court of Appeals, Sixth Circuit.

Witness my official signature and the seal of said court, at Cincinnati, Ohio, in said circuit, this 3rd day of June, 1901, and the 125th year of the Independence of the United States of America.

FRANK O. LOVELAND,
Clerk United States Circuit Court of Appeals for the Sixth Circuit.

94 [Endorsed:] File No., 18,138. Supreme Court of the United States. No. 653, October term, 1900. The Louisville Trust Co., trustee, &c., *vs.* Leonard Comingor. Writ of certiorari. Filed May 21, 1901. Frank O. Loveland, clerk.

Endorsed on cover: File No., 18,138. Supreme Court U. S., October term, 1901. Term No., 309. The Louisville Trust Company, petitioner, *vs.* Leonard Comingor. Writ of certiorari and return. Filed June 6, 1901.

No. 553. 309.

Brf. of Willson for Petitioner

29438
Office Supreme Court U. S.
FILED
APR 27 1901
JAMES H. McKENNEY,

Filed April 27, 1901.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

THE LOUISVILLE TRUST COMPANY, TRUSTEE IN BANKRUPTCY OF SIMONSON, WHITESON & CO., D. G. SIMONSON, I. WHITESON AND LEO STERN, BANKRUPTS, ... Petitioner,

VS.

LEONARD COMINGOR, ... Respondent.

Motion, Petition for Writ of Certiorari, and Brief for the Petitioner, The Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, Bankrupts, in Bankruptcy.

AUGUSTUS E. WILLSON,
Counsel for The Louisville Trust Company, Trustee.

P. G. HUNSINGER PRESS, LOUISVILLE, KY.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

THE LOUISVILLE TRUST COMPANY, TRUSTEE IN BANKRUPTCY OF SIMONSON, WHITESON & CO., D. G. SIMONSON, I. WHITESON AND LEO STERN, BANKRUPTS, ... *Petitioner*,

vs.

LEONARD COMINGOR, ... *Respondent.*

To Leonard Comingor:

You are hereby notified that on Monday, April 29th, A. D. 1901, at the motion hour, we will file a petition and enter a motion before the Supreme Court of the United States at Washington, D. C., to grant a writ of *certiorari*, directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, to require said Court to certify to the Supreme Court of the United States for its review and determination a certain cause in said Circuit Court of Appeals lately pending, wherein Leonard Comingor was petitioner for review in the matter of Sinsheimer, Levinson & Co. &c. against Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, bankrupts, in bankruptcy.

AUGUSTUS E. WILLSON,
Counsel for The Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, Bankrupts.

I accept service April 23, 1901.

W. M. SMITH,
Attorney for L. Comingor.

Executed the above notice by delivering on the 23d day of April, A. D. 1901, a true copy thereof to Leonard Comingor. I am an adult person and not interested in anywise in this matter.

MORRIS B. GIFFORD.

Subscribed and sworn to by Morris B. Gifford before me this 23d day of April, A. D. 1901. My commission expires January 6, 1904.

[SEAL]

RANDOLPH H. BLAIN,
Notary Public, Jefferson County, Kentucky.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

THE LOUISVILLE TRUST COMPANY, TRUSTEE IN BANKRUPTCY, ... *Petitioner*,

VS.

L. COMINGOR, ... *Respondent.*

Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Sixth Curcuit, requiring it to certify to the Supreme Court of the United States, for its revision and determination, the petition for review in bankruptcy taken by the said L. Comingor against the Louisville Trust Company, trustee in bankruptcy of Simonson, Whiteson & Company, in the matter of Sinsheimer, Levinson & Company and others against Simonson, Whiteson & Company, in bankruptcy, lately depending in said Court of Appeals.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the Louisville Trust Company, trustee in bankruptcy of Simonson, Whiteson & Company.

I.

This cause involves an entirely new question—a question of vast importance arising under the Bankruptcy Act of 1898.

The firm of Simonson, Whiteson & Co., and the individual members composing that firm, made a general assignment, for the benefit of all their creditors, to L. Comingor, on the 5th day of December, 1898, and Comingor duly accepted the trust.

Within the four months, prescribed by the Bankruptcy Act, a petition was filed by Sinsheimer, Levinson & Co. and others in the proper District Court of the United States, praying that the said assignors under the general assignment be adjudged bankrupts. Said Comingor was made a party to the proceeding and was duly summoned. (Act, Sec. 2 (6).) The prayer of the petition was granted, and upon appeal to the Circuit Court of Appeals a reversal was obtained. Upon further proceedings in the District Court a second adjudication was had and a second appeal prayed. Upon this appeal the decree was affirmed. The cause was then referred to the referee in bankruptcy. During the pendency of the cause before the referee a temporary receiver was appointed to gather in the assets of the bankrupts.

In June, 1900, a rule was issued by the referee, requiring L. Comingor, the assignee under the State assignment, to show cause why he should not pay to the trustee the sum of $3,398.90, being the amount retained by him from the estate of the bankrupts and which he claimed ought to be allowed to him for his commission; and this is directly authorized by the Act, Sec. 2 (7), which provides that controversies in relation to the estate may be determined. On the 28th day of June, 1900, another rule was issued against the said Comingor to show cause why he should not pay the further sum of $3,000, claimed by him to have been paid to M. A., D. A. and J. G. Sachs as counsel, for their services rendered to him as assignee under the said general assignment.

Said Comingor filed responses to said rules, claiming that as to the $3,398.90 held by himself he believes the Court will, on full hearing, allow him said amount for his commissions as assignee, and as to the $3,000 paid to his counsel he shows that he paid said sum for their services. He further shows that he has no funds with which to pay said trustee in bankruptcy either of the sums covered by the rules. He further set up by way of response that a suit for the settlement of his accounts as assignee was pending in the State Court and that he was still subject to the jurisdiction of said Court.

The referee adjudged said responses insufficient; whereupon said L. Comingor, on the 30th day of June, filed a petition praying that the orders of the referee might be reviewed by the Judge. The cause was then heard by the Judge, and on the 16th day of July was by him referred back to the referee to ascertain certain facts, to-wit, what services were rendered by the said Comingor and his counsel, and the value thereof and the necessity therefor. Proof was offered upon this re-reference by said Comingor and was taken before the referee, and a new report under said order of re-reference duly made to the Court. During the taking of such proof under the re-reference, to-wit, on the 10th of November, 1900, said Comingor tendered an amended response in which for the first time he sought to question the jurisdiction of the Court to try the matter in controversy except in a plenary suit. The referee declined to receive the amended response because under the order of re-reference he deemed he had no authority so to do. The cause was then re-heard by the Judge, and on the 19th of January, 1901, he filed an opinion therein, and on the 26th of January, 1901,

an order was entered that the petition for review filed by said Comingor be refused and dismissed, and said Comingor was directed to pay to The Louisville Trust Company, trustee in bankruptcy, the sums of $3,398.90 and $3,000. Said Comingor then filed in the Circuit Court of Appeals his petition for review of matters of law, and on April 2, 1901, the Circuit Court of Appeals entered an order setting aside the orders of the referee, adjudging the responses of the petitioner insufficient, and the order of the Court affirming the same.

The full effect of the decision of the Circuit Court of Appeals is this:

1. That the referee and the District Court could not proceed by summary proceedings to compel the assignee to turn over to the trustee in bankruptcy funds in his possession to which he claimed and asserted no title, but must proceed by plenary suit.

2. That the filing of the response by the assignee, Comingor, to the rule, the making of a stipulation and taking of proof thereunder, and the trial upon the merits of the response, do not amount to a consent to the jurisdiction.

3. That the Circuit Court of Appeals, though reviewing matters of law only, may assume as true, averments made in response to a rule.

4. That a response showing that a fund in question was paid to respondent's counsel is sufficient without its appearing that respondent is unable to recover back the fund from the counsel.

5. That the trustee must submit to the State Court to decide what part, if any, of the assets might be used by the assignee for himself and his attorneys, and consequently must

leave to the State Court the partial administration of the bankrupt's estate. This is in conflict with the decision of the same Circuit Court of Appeals in Leidigh Carriage Co. vs. Stengel, 95 Fed. 637.

In *in re* Arthur E. Mueller, trustee in bankruptcy of Edward B. Nugent, against W. T. Nugent, the Circuit Court of Appeals in its opinion stated in substance that in order to compel the assignee under a general assignment to deliver to the trustee in bankruptcy the funds in his hands a plenary suit must be brought. This Court has granted a *certiorari* in that case and has also advanced the case, and it is now on the docket of this Court for the 28th of October. That part of the opinion of the Court below is not necessarily involved in the controversy and therefore this Court may not find it necessary to consider the point; however, in the case at bar it is the main question involved, and owing to its importance your petitioner respectfully submits that it ought to be passed on by this Court in order that there may be a uniform administration of the bankruptcy law throughout all the circuits. Yet there is no such uniformity. For instance, in the State of Indiana (Seventh Circuit), *in re* Smith, 92 Federal, page 135, the Judge sustained the right to compel the assignee to deliver to the trustee in bankruptcy property held by him as assignee; while in Pennsylvania Judge McPherson, *in re* Stokes, 106 Federal, 312, has ruled the same way. The Circuit Court of Appeals in the Ninth Circuit, *in re* Francis-Valentine Co., 94 Fed., 793, has sustained the right to compel a sheriff by rule to deliver to the trustee property of the bankrupt seized within four months prior to the proceedings in bankruptcy, and distinguishes that case from the case of Marshall vs. Knox, 16 Wall., 551, upon the theory that the party ruled is a mere custodian and holds no title.

The District Courts in Vermont, New York and West Virginia have also decided that the proceeding may be by rule under such circumstances. (*In re* Brooks, 91 Fed. 518; *in re* Raymond W. Kenney, 95 Fed. 427; *in re* Moore, 104 Fed. 869.) Besides, your petitioner thinks the case of White vs. Schloerb, 178 U. S. 542, is in conflict with the decision of the Circuit Court of Appeals which is now complained of.

It is a notable fact that while there are so many cases sustaining the right of the court to compel the assignee, or other mere custodian, by rule to deliver to the trustee in bankruptcy the assets belonging to the estate, there are no cases sustaining the other view except those of the Circuit Court of Appeals in this, the Sixth Circuit.

The petition for review in the Circuit Court of Appeals was not confined to seeking a review of matters of law only arising in the record of the bankruptcy proceeding, but contained allegations as to many extraneous matters alleged to have occurred in the State Court, making the hearing in the Circuit Court of Appeals an appeal in equity instead of a review of matters of law. Nevertheless the Circuit Court of Appeals refused to strike out these extraneous matters and refused to permit the trustee to traverse them. In these rulings it is respectfully submitted that the Circuit Court of Appeals erred in the very construction of the Bankruptcy Act which it had previously laid down in the case of Cunningham vs. German Insurance Bank, 95 Fed. 932.

Even if under the case of Bardes vs. Bank, 178 U. S. 524, there was no original jurisdiction to issue the rule, the respondent, Comingor, waived that objection and consented to the jurisdiction by appearing and defending upon the merits and invoking the jurisdiction of the Court, which,

according to the reasoning of Judge Lowell, *in re* Steuer, 104 Fed. 976, is a consent to the jurisdiction. This view the District Judge upheld. Your petitioner submits that it is sound.

As the question involved in the case at bar will come before this Court on the 28th of October in the Nugent case, it is respectfully suggested that this cause should be ordered certified up and also set for hearing at the same time.

Wherefore, your petitioner prays that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record in all proceedings in said Circuit Court of Appeals in the cause therein entitled, "Sinsheimer, Levinson & Co. and others against Simonson, Whiteson & Co., in bankruptcy, No. 943," to the end that said cause may be reviewed and determined by this Court as provided by law; and that the judgment of the said Circuit Court of Appeals in said case may be so modified as to deny the petition for review filed by the said Leonard Comingor to said Circuit Court of Appeals.

And your petitioner will ever pray.

AUGUSTUS E. WILLSON,
Counsel for Petitioner.

STATE OF KENTUCKY, }
JEFFERSON COUNTY. } *Sct.*

H. V. Loving, being duly sworn, says that he is the President and chief officer of The Louisville Trust Company, trustee in bankruptcy of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, bankrupts, the petitioner named; that he has read the foregoing petition, and the facts therein stated are true, as he believes.

H. V. LOVING.

Subscribed and sworn to before me this 23rd day of April, A. D. 1901. My commission expires on the 27 day of January, 1902.

[SEAL]

NORA KIRCH,
Notary Public within and for the County of Jefferson, State of Kentucky.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

THE LOUISVILLE TRUST COMPANY, TRUSTEE IN BANKRUPTCY OF SIMONSON, WHITESON & CO., D. G. SIMONSON, I. WHITESON AND LEO STERN, BANKRUPTS, ... *Petitioner,*

vs.

LEONARD COMINGOR, ... *Respondent.*

BRIEF FOR PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI.

As the petition for a writ of *certiorari* is itself so complete but little need be said in a brief in support thereof.

I.

The petition sets forth as a ground why the writ of *certiorari* should be granted that the ruling of the Circuit Court of Appeals prohibiting a court in bankruptcy to gather in the assets of the bankrupt by summary process in cases where a party holding possession of the assets is a mere custodian, is in conflict with the decisions of other Federal Courts and thereby the uniform administration of the law is prevented.

The petition for the writ cites the cases showing this want of uniformity.

II.

The petition also shows that in Bardes vs. Bank, 178 U. S. 524, a party might consent to the jurisdiction of the Federal Court; and *in re* Steuer, 104 Fed. 976, Judge Lowell construes a defense to the merits as such a consent.

III.

The Circuit Court of Appeals in effect holds that where a rule is issued against a party the averments in his response must be conclusively assumed to be true. In the case at bar the testimony taken before the referee, though made part of his report to the Judge, was not included in the record carried to the Circuit Court of Appeals.

IV.

The response made to the rule issued by the referee shows that part of the bankruptcy fund was paid to the counsel of the assignee under the State law for their services. It does not show that any court authorized the payment of such funds, and it is not the practice in equity, either in the Staet or Federal Courts, for fiduciaries to determine for themselves what, if any, compensation shall be paid their counsel, but to submit such questions to the court before whom their accounts are settled, and then if the courts make the allowances they are paid.

V.

The Circuit Court of Appeals for the Sixth Circuit, in Leidigh Carriage Co. vs. Stengel, 95 Fed. 637, has expressly

decided that the jurisdiction of the Federal Court to wind up the affairs of a bankrupt is paramount, and further that the assignee may be made a party to the bankruptcy proceedings and may be required to hold the assets of the bankrupt subject to the order of the District Court in bankruptcy; nevertheless the decision of the same Circuit Court of Appeals now complained of is in direct conflict with that ruling, for it is now declared that the making of Comingor a party to the proceedings was improper, and that he can not be compelled in the bankruptcy proceedings to deliver the assets to the trustee in bankruptcy, but that the trustee must resort to a plenary suit for this purpose, which means in this instance that he must bring an action in the State Court and thereby leave to the State Court at least a partial administration of the assets of the bankrupt. This deprives the Federal Court of its paramount jurisdiction. In Leidigh Carriage Co. vs. Stengel, 95 Fed. 637, the same Court of Appeals, through Judge Taft, said:

"It is next objected in argument and the briefs, though "we do not find an assignment of error specifically directed "to the point, that the assets of this defendant bankrupt "are in the hands of the assignee for the benefit of cred- "itors, subject to the orders of the probate court; that the "District Court in bankruptcy can not obtain jurisdiction "to administer the assets, which are in the course of "administration, and in the possession of officers of other "courts. If this objection were to be sustained it would "seriously embarrass the enforcement of the bankruptcy "law, and make it subordinate to the State insolvency "assignment laws, wherever an insolvent debtor who had "committed an act or bankruptcy had placed his assets in "the hands of the assignee acting by State law under the "direction of the probate court. It is generally true that "as between courts of concurrent jurisdiction, the court

"which first obtains possession of the *res* must retain "possession of it until the *res* has been finally dis- "posed of, and anyone else interested in the *res* must "apply to that court if he desire relief with respect to the "property in the possession of that court. But as between "District Courts sitting in bankruptcy and State courts "for the administration of insolvent estates, there is no "concurrent jurisdiction. The Constitution of the United "States, by giving to Congress the power to pass uniform "bankruptcy laws, gives to the courts in which Congress "shall vest this power paramount jurisdiction in bank- "ruptcy proceedings. The orders in bankruptcy are "therefore superior to those of a State insolvency court. "Section 720, which forbids a court of the United States "from enjoining proceedings in a State court, expressly "excepts bankruptcy proceedings. This is the plain "intimation, by Federal and paramount law, that where a "Federal bankruptcy court shall take jurisdiction, there the "State insolvency court must yield. Hence it is that "the assignee for the benefit of creditors of the defendant "company, the grantee in the deed, which is by the Federal "law an act of bankruptcy, may be made a party in the "bankruptcy court, and may be required to hold the "assets of the bankrupt subject to the order of the district "court in bankruptcy."

In some circuits it has been declared that such assignments are absolutely void, while in others it is declared that the assignment is merely voidable, but is made void by a decree of adjudication in bankruptcy. In the case at bar, in the first opinion rendered by the Circuit Court of Appeals, 95 Fed. 948, the Court declared that the adjudication avoided all sales made by the assignee, in other words, that the adjudication rendered all acts of the assignee void. If his sales are void, his employment of counsel and his paying his counsel would also be void. That is the law of this circuit, and Comingor was a party to the proceedings at the time it was so established; yet if the present opinion of the Circuit Court of

Appeals is allowed to stand, the trustee in bankruptcy will be compelled to resort to the State Court with its innumerable delays, and there submit to a retrial of the question of whether or not Comingor was entitled to any compensation at all, and whether or not he should have paid his counsel out of the funds of the estate without authority from the State court so to do. This surely is taking from the bankruptcy court the jurisdiction to administer upon the bankrupt's estate, and this too in the face of the ruling of our Circuit Court of Appeals in the Leidigh Carriage Co. case, *supra.* In this same case, quoted in 95 Fed. 954, Judge Taft declared that the bankruptcy proceedings would possibly defeat the payment of the costs already earned in the State Court proceedings. The goods had been converted into money, and, with the exception of the two sums now in controversy, paid into the State Court. The trustee in bankruptcy applied to the State Court for this fund in its depository and yet that Court required the payment of the costs of its officers and only directed its receiver to deliver to the trustee in bankruptcy the balance after such costs were paid. If the trustee is now compelled to bring an action in the State Court to recover from Comingor or his counsel the funds now in question, that Court would undoubtedly consider the rights of Comingor and his counsel to their compensation. The mere fact of the trustees invoking the aid of the State Court, would perhaps give it such right, and the result would be that the State court and not the bankruptcy court would to that extent be administering upon the assets of the bankrupt.

In re John A. Etheridge Furniture Co., 92 Fed. 331, Judge Barr appointed a receiver to take from the assignee under the general assignment the funds of the bankrupt.

See Bryan v Bernheimer No 58 Act J. 1903

In the case of Lea Brothers vs. West, 91 Fed. 237, the same question was decided by the District Court for the Eastern District of Virginia. That case was taken to this Court on the certificate of a particular question.

Section 2 of the Act, (6) and (7), is as follows: "bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy;" and "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

It would seem plain, then, that if the Federal Court may bring in and substitute additional parties when necessary for the complete determination of a matter in controversy and cause estates of bankrupts to be collected and determine controversies in relation thereto, the questions whether officers of the State court should be allowed their costs; whether assignees might retain compensation for their services as assignees; and whether they may pay their counsel out of the estate without any allowance of court therefor, must be relegated to the State court in a plenary suit, then the jurisdiction of the Federal Court is not supreme and the bankruptcy court may not bring in new parties for the complete determination of matters in controversy, and may not cause the estates to be collected and determine controversies in relation thereto.

The consequences of the ruling of the Circuit Court of Appeals now complained of would lead to results in some instances destroying the bankruptcy law, certainly in cases where the making of a general assignment is the cause of bankruptcy. For example: Suppose an assignee should

decline to turn over any of the funds coming to his hands. The Circuit Court of Appeals has held that under such circumstances the only remedy is for the trustee to bring a plenary suit in the State Court. Suppose the State Judge, as many of them will do, should decide that, having the first jurisdiction, he will hold the assets in his Court. Then under these conditions the trustee undoubtedly would be bound by that decision and the whole estate would be then administered in the State Court to the exclusion of the bankruptcy court. I can see no escape from the logic of this reasoning and no escape from the result described except by a complete reversal or a serious modification of the ruling of the Circuit Court of Appeals.

Therefore it is respectfully prayed that the petition for a *certiorari* be granted.

AUGUSTUS E. WILLSON,

Counsel for The Louisville Trust Co., Trustee in Bankruptcy of Simonson, Whiteson & Co. and others, Bankrupts.

2945

cf. 176 U.S. 309.
(By. of Willson & Co. (Ky.) Case

Office Supreme Court U.S.
FILED
APR 27 1901
JAMES H. McKENNEY,
Clerk.

Filed April 27, 1901.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

The Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, Bankrupts, ... Petitioner,

vs.

Leonard Comingor, ... Respondent.

MOTION TO ADVANCE THE CASE FOR HEARING.

GROUNDS FOR MOTION TO ADVANCE.

AUGUSTUS E. WILLSON,
Counsel for The Louisville Trust Company, Trustee.

P. C. HUNSACKER PRESS, LOUISVILLE, KY.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

THE LOUISVILLE TRUST COMPANY, TRUSTEE IN BANKRUPTCY OF SIMONSON, WHITESON & CO., D. G. SIMONSON, I. WHITESON AND LEO STERN, BANKRUPTS, ... *Petitioner*,

VS.

LEONARD COMINGOR, ... *Respondent.*

To Leonard Comingor:

You are hereby notified that on Monday, April 29th, A. D. 1901, at the motion hour, we will enter a motion before the Supreme Court of the United States at Washington, D. C., to advance and hear the above styled cause on the earliest practicable day, and will then file grounds in support of said motion.

AUGUSTUS E. WILLSON,
Counsel of The Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, Bankrupts.

I accept service April 23, 1901.

W. M. SMITH for L. COMINGOR.

Executed the above notice by delivering on the 23rd day of April, A. D. 1901, a true copy thereof to Leonard Comingor. I am an adult person and not interested in anywise in this matter.

MORRIS B. GIFFORD.

Subscribed and sworn to by Morris. B. Gifford before me this 23rd day of April, A. D. 1901. My commission expires Jan. 6, 1904.

[SEAL]

RANDOLPH H. BLAIN,
Notary Public, Jefferson County, Kentucky.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

THE LOUISVILLE TRUST COMPANY, TRUSTEE IN BANKRUPTCY OF SIMONSON, WHITESON & CO., D. G. SIMONSON, I. WHITESON AND LEO STERN, BANKRUPTS, ... *Petitioner*,

VS.

LEONARD COMINGOR, ... *Respondent.*

MOTION TO ADVANCE THE CASE FOR HEARING.

Now comes The Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, bankrupts, by Augustus E. Willson, its counsel, and moves this Honorable Court to advance and hear this cause at the earliest practicable day, and submits herewith its grounds for said motion.

GROUNDS FOR MOTION TO ADVANCE.

1. A petition for *certiorari* has been filed in this cause. Two important questions are involved, namely, the right of the District Court by rule to require the assignee holding property of the bankrupts under a general assignment under the State law, which was the ground of bankruptcy and for which an adjudication was had, to turn over to the trustee

in bankruptcy said property; or whether the trustee in bankruptcy shall be compelled to resort to an independent action which, in this as in most cases, will have to be brought in the State courts where the delays are numerous and vexatious.

2. Whether, after a rule has been actually issued against the assignee to deliver the property to the trustee in bankruptcy, he responds and defends upon the merits without objecting to the jurisdiction, he can, after the case is decided against him, be heard to complain that the Court was without jurisdiction to proceed against him.

The importance of the case for the proper administration of the bankruptcy law can not be overestimated. The rulings upon the question involved are different in so many other circuits from the ruling in the case at bar as to destroy the uniformity in the administration of the law.

In re Brooks, 91 Fed., 518,

In re Raymond W. Kenney, 95 Fed., 427,

In re Moore, 104 Fed., 869,

In re Francis-Valentine Co., 94 Fed., 793,

In re Smith, 92 Fed., 135,

In re Stokes, 106 Fed., 312,

In re White vs. Schloerb, 178 U. S., 542,

In re Steuer, 104 Fed., 976,

All of these cases, it is submitted, are in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit now complained of.

3. The same question is involved in the case of Mueller, Trustee, against Nugent, which is set for hearing in this Court on the 28th of October, and many cases throughout the country are awaiting action upon the question.

In the Nugent case the statement in the opinion, that a plenary suit must be brought in order to recover from the

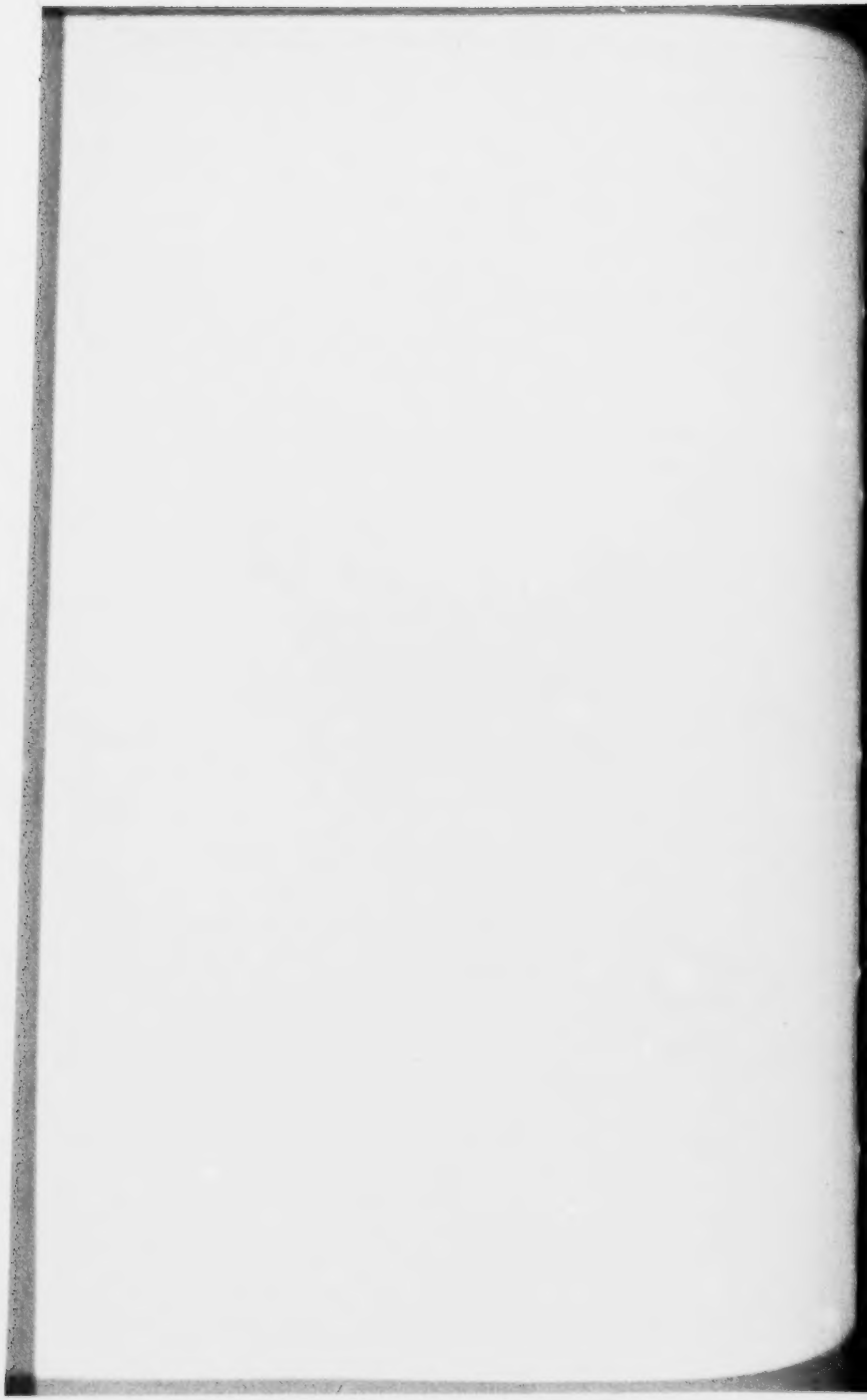
assignee under the State law the assets of the bankrupt, was *obiter dictum*, while in the case at bar the question is directly involved, and it is respectfully suggested that this case should be advanced and heard with the Nugent case in order that all the points involved may be fully decided in cases involving all of such points.

Again, it is respectfully suggested that this decision of the Circuit Court of Appeals arises from a misconstruction of the utterances of this Court in Bardes vs. Bank, 178 U. S. The importance of having all misconceptions of this Bardes case removed, and of having the jurisdictional question under the bankruptcy act authoritatively determined, so that the law may be uniformly administered, is strongly commented upon by Judge Lowell *in re* Ward, 104 Fed., 985.

For these reasons it is respectfully urged that this case be heard at the earliest practicable date.

Respectfully submitted,

AUGUSTUS E. WILLSON,
Counsel for The Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co., etc.



No. 309.

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Brf. of Wilson for Petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Oct. 21, 1901.

No. 309.

The Louisville Trust Company, Trustee, Etc., Petitioner,

vs.

Leonard Cominger.

Brief for The Louisville Trust Company, Trustee, Etc.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

AUGUSTUS E. WILLSON,
Counsel for Petitioner.

P. O. HOUSEHOLDER, PRESS, LOUISVILLE, KY.

29501

No. 309.

Supreme Court of the United States.

THE LOUISVILLE TRUST COMPANY, ETC., . . *Petitioner.*

vs.

LEONARD COMINGOR.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

On December 5, 1898, Simonson, Whiteson & Co., and the individuals composing that firm, made a general assignment, under the laws of the State of Kentucky, for the benefit of their creditors. On the 14th day of February, 1899, the requisite number of creditors filed a petition in the District Court, praying that said assignors be declared bankrupt, upon the ground of such assignment. To this petition Comingor, the assignee, was made a party and was duly summoned. An adjudication in due season was had and the case referred to the proper referee. During the pendency of the cause the Judge of the District Court issued an injunction in effect

restraining the bankrupts, the assignee and others from taking any steps or instituting any proceedings affecting the estate of the bankrupts. His right to do this is expressly recognized by the Circuit Court of Appeals for the Sixth Circuit in Leidigh Carriage Co. vs. Stengel, 95 Fed. 637, where the Court said: "That the assignee for the benefit of creditors . . . may be made a party in the bankruptcy court, and may be required to hold the assets of the bankrupt subject to the order of the District Court in bankruptcy."

The referee, following the practice established by Judge Barr in the case of Etheridge Manufacturing Co., and under authority of the Act, Sec. 2 (3), appointed the Louisville Trust Company receiver, with directions to gather in and hold the assets of the bankrupts; and, also following the practice established by the judge in the same case, the referee on May 28, 1900, entered an order requiring the assignee to file before him (the referee) a detailed statement of the receipts and disbursements made by him from the estate of the bankrupts. (Rec., p. 8.) This statement was duly filed by the assignee, Comingor. (Rec., p. 6, etc.) On the 20th of June, 1900, the referee issued a rule against the assignee, D. A. Sachs, his attorney, and Zack Phelps, another of his attorneys, to show cause why they should not be required to pay over to the receiver certain sums paid to said attorneys and $3,398.90 held by the assignee. (Rec., p. 12.) The assignee, Comingor, filed before the referee a response to the rule showing that he retained said sum of $3,398.90 on account of his commissions as assignee before the bankruptcy proceedings were instituted, relying upon the hope that he would be entitled to more than that sum on final settlement; that for his services rendered the estate he believed the court would, on final hearing, allow him at least that sum; that he had no means and had used said money from time to time, relying

upon its being his; that he was unable to pay said sum into court, having neither money nor property, and that he had made efforts to borrow said money without success. His response closes with these words: "He asks the court for such relief in the premises as the court deems proper." (Rec., p. 15-16.)

On the 23d of June, 1900, the referee adjudged that response insufficient, and ordered the assignee to deliver to the receiver by time fixed the said sum of $3,398.90. (Rec., p. 16.)

On the 28th of June, 1900, the referee issued another rule against said Comingor, requiring him to show cause why he should not pay over to the receiver the sum of $3,000 recited in his report as having been paid to his attorneys, M. A., D. A. & J. G. Sachs, and the further sum of $200 recited in said report as having been paid to his attorney, Zack Phelps. (Rec. p. 17.) To this rule Comingor filed a response similar to that filed to the first rule, but further setting up that he had brought a suit in the State Court for the settlement of his accounts, and that he was subject to the jurisdiction of that court. (Rec., pp. 17, 18.)

This response was also adjudged insufficient, and the referee having ordered the said Comingor to pay to the receiver the said sum of $3,398.90, which he retained as his commissions, and the $3,000 paid by him to his counsel, and he having failed to obey said order, the referee reported the facts to the judge with a recommendation that said Comingor be dealt with for disobeying said orders. (Rec., pp. 27-8.) On the same day Comingor filed with the referee his petition for a a review by the judge. (Rec., p. 26-7.)

While the case was pending before the judge, he, on July 16, 1900, made a special reference to the referee to ascertain what services, if any, were rendered by the assignee and

what by his attorneys, the necessity therefor and the value thereof. (Rec. p. 29.) While the case was before the referee on the special reference, to wit, on November 10, 1900, the assignee, Comingor, tendered to the referee an amended response, raising the question of jurisdiction to entertain the rules *ab initio*. (Rec., pp. 29, 30.) This response was refused by the referee upon the ground that it was not pertinent to the matters contained in the order of reference. In due season the referee filed his report under this special reference, in which he found, among other things, that the assignee and one of his counsel had acted in bad faith in the administration of their trust and had not disposed of the estate for the interest of the creditors.

Comingor, having prayed for a review by the judge, he (the judge) on the 26th of January, 1901, dismissed the petition for review and ordered the said Comingor to pay to The Louisville Trust Company (who had in the mean time been elected trustee) the said sums of $3,398.90 and $3,000. (Rec., pp. 40, 41.) In order to secure a review of this decision by the Circuit Court of Appeals, Comingor filed his petition in that court on January 28, 1901. (Rec., p. 1, *et seq.*) In the Court of Appeals the trustee then filed a petition for a *certiorari* to supply the many necessary parts of the record which were not copied in the transcript, also a motion to dismiss the appeal for failure to file a complete record, and also motions to strike from the record thus taken up many extraneous matters. (Rec., p. 42.)

The motions to dismiss the petition and to add to the record were denied by the Circuit Court of Appeals. (Rec., p. 58.)

The motion to strike out the extraneous parts of the petition for review were not passed on.

The case on motion of the petitioner was, over the objection of the trustee, advanced for hearing. (Rec., p. 58.)

On April 2, 1901, the Circuit Court of Appeals entered a decree reversing the order of the District Court in confirming the orders of the referee, with directions to the District Court to set aside the referee's order requiring the payment of the moneys aforesaid. (Rec., p. 59.)

On April 10, 1901, the Circuit Court of Appeals filed an opinion in the case. (Rec., p. 60, etc.)

The case now comes before this Court, upon a *certiorari*, duly granted, to try *de novo* the questions involved in the petition of Comingor for a review by the Circuit Court of Appeals.

The questions involved are as follows:

1. Did the referee have jurisdiction by *summary process* to compel the assignee, Comingor, to deliver to the receiver in bankruptcy certain funds which had come to his hands as assignee?

2. Was the response of the assignee that he had, without authority of any court, used $3,398.90 in expectation that the same would be allowed to him as his commission as assignee a sufficient response, if true?

3. Was the response of the assignee to the rule to pay $3,000, claimed by him to have been delivered to his counsel for their services rendered to him as assignee, a sufficient response, when such response failed to show that the assignee had sought to repossess himself of that $3,000 from the attorneys after proper effort duly made?

4. Was the referee or the judge bound to believe and accept as true statements of facts contained in the responses of the assignee?

As new questions arising after the case reached the Circuit Court of Appeals, the following are involved:

(*a*). Was or not the petitioner required to file a complete transcript of the record in the Circuit Court of Appeals?

(*b*). Where a complete record is not filed in the appellate court, should the case on motion be dismissed?

(*c*). Should not matters extraneous to the record when recited in the petition filed in the Circuit Court of Appeals have been stricken out upon motion seasonably made?

(*d*). Is the jurisdiction of the State Court to administer upon an assigned estate ousted by an adjudication in bankruptcy?

Specifications of Errors Relied Upon.

The Louisville Trust Company, Trustee, petitioner, represents that the Circuit Court of Appeals erred in the following particulars:

1. In reversing, by its decree, the decree of the District Court confirming the orders of the referee requiring the assignee, Comingor, to pay to the trustee the sums of $3,398.90 and $3,000.

2. In vacating and setting aside by its decree the orders of the referee making absolute the orders made by him directing said Comingor to pay to the trustee in bankruptcy said moneys mentioned in his said orders.

3. The Circuit Court of Appeals erred, in its opinion, in finding that the referee and the District Court had no jurisdiction, by summary process, to compel the assignee, Comingor, to pay to this petitioner the sums last mentioned.

4. That the Circuit Court of Appeals erred, in its opinion, in holding that Comingor, by filing his responses to the rules without objecting to the jurisdiction, did not thereby consent to the jurisdiction.

5. The Circuit Court of Appeals erred, in its opinion, in finding that the response of said Comingor to the rule requiring him to pay $3,398.90 was sufficient.

6. The Circuit Court of Appeals erred, in its opinion, in finding that the response of said Comingor to the rule requiring him to pay $3,000 which had been paid by him to his attorneys was sufficient.

7. The Circuit Court of Appeals erred in overruling the motion to dismiss the case for want of a complete record.

8. The Circuit Court of Appeals erred in denying the motion for certiorari for diminution of the record.

BRIEF OF THE ARGUMENT.

The District Court in Bankruptcy Has Power by Summary Process to Compel an Assignee Holding Possession of the Estate of a Bankrupt Under a General Assignment to Deliver the Assets to the Trustee in Bankruptcy.

This is the important question in this case. The court will understand that I do not contend that the District Court has jurisdiction in a summary way to try a question of title between the trustee and third parties; but in gathering in the assets of the bankrupt under Section 2 (7) of the Bankruptcy Act, the trustee is not required to resort to a plenary suit when proceeding against a mere agent or custodian of the property.

I submit that Bryan, etc., vs. Bernheimer, decided by this Court April 15, 1901, is decisive of the question involved. It is there decided that a general assignment does not constitute the assignee as one holding for value, but simply makes him an agent for the distribution of the estate; that a proceeding against an assignee by rule does not involve the question of jurisdiction over a suit by the trustee against a

person claiming an adverse interest in himself. But, to use the language of the court: "The present case involves no question of jurisdiction over a suit by a trustee against a person claiming an adverse interest in himself."

It is the distinction implied by that quotation which justified the referee in proceeding by rule in the case at bar. Bryan vs. Bernheimer clearly holds that a purchaser from an assignee under a general assignment may by summary process be dispossessed of property which he had purchased from the assignee and paid for. If his purchaser may be thus dispossessed, why may not the assignee himself?

The Court of Appeals in its opinion (Record, page 67, etc.) cites Marshall vs. Knox, 16 Wallace, 551, to support its view that assets may not be recovered from such an assignee except in a plenary suit; but that court overlooked the distinction between a proceeding to compel an agent or bailee or custodian to deliver over property to the bankruptcy court's officer and an independent proceeding against a third party to determine a *bona fide* title to the goods in question. The distinction, however, was marked by the Court of Appeals for the Ninth Circuit *in re* Francis-Valentine Co., 94 Fed. 793, for there the case of Marshall vs. Knox was differentiated in this language:

> "In that case a lessor of the bankrupt had caused the sheriff, under a writ of provisional seizure, to take possession of certain property of the bankrupt, which the lessor claimed the right to hold as a pledge for the payment of rent which was due him. It was held that the District Court sitting in bankruptcy had no jurisdiction to proceed by rule to take the goods from the possession of the sheriff. The court, referring to the seizure of the goods, said: '*The landlord claimed the right thus to hold posses-*

sion of them until his rent was satisfied. This claim was adverse to that of the assignee.' These words quoted from the opinion fully explain the ground of the decision. It was because the claim was adverse to that of the assignee. In the present case the sheriff had possession, not in opposition to the right of the bankrupt nor in antagonism to its title, but his possession was based entirely upon the assumption that the title was in the bankrupt." (The italics are our own.)

It has been held in other lower courts that parties other than bankrupts may by rule be compelled to deliver assets to the trustee where such parties are not holding under adverse title.

In re Brooks, 91 Fed. 508.
In re Kenney, 95 Fed. 427.
In re Moore, 104 Fed. 869.

In re Smith, 92 Fed. 138, Judge Baker said :

" It follows that the assignee is a mere naked bailee for the creditors, without a shred of title or lawful authority to the possession of the bankrupt's estate ; and it would certainly be strange if, when the Bankrupt Court finds property in the possession of such a bailee, it may not in a summary way require him to surrender possession to the court, which alone has power to administer the estate."

In re Stokes, 106 Fed. 313, Judge McPherson said :

" The assignee of Airey does not hold the assigned property by an adverse title. He is the mere hand of the assignor for distribution, and is to be treated upon this application precisely as the assignor would have to be

treated. I think there can be no doubt about the court's authority to compel Airey by summary order to transfer his individual property to the trustee, and consequently that a similar power exists to compel his assignee to make a like transfer."

BY RESPONDING TO THE MERITS OF THE RULE, COMINGOR CONSENTED TO THE JURISDICTION.

The Supreme Court has declared :

"Moreover, the consent of the proposed defendant, Bernheimer, to this mode of proceeding is shown by the terms of his claim, in which, not protesting against the jurisdiction of the Court of Bankruptcy, he expressly submitted his claim to that court, and asked for such orders as might be necessary for his protection." (Bryan vs. Bernheimer, *supra*. See also *in re* Steuer, 104 Fed. 976.)

THE SUFFICIENCY OF THE RESPONSES TO THE RULES.

To the rule to pay $3,398.90 Comingor responded, in substance, that he had used the money in anticipation of its being allowed to him as commissions for services as assignee, and that he had no means with which to repay the same. Insolvency or inability to pay is not a legal response to a rule to pay, though on the question of punishment for failure to pay such insolvency is always considered by the court. The District Court has not punished nor made any order for punishing Comingor. It simply entered a decree requiring him to pay said sum to the trustee, and the petition for review now pending relates solely to that order. I earnestly

contend that if this Court holds in favor of the jurisdiction, the case should be affirmed right there and leave the question of the sufficiency of Comingor's response, averring insolvency, to be determined when the lower court shall have cited him for contempt in case he disobeys the order to pay. A decree may be entered against an insolvent. The enforcement or collection of that decree comes later.

The Circuit Court of Appeals, in its opinion (Rec., p. 60), uses this language: "The action of the referee assumes that the facts were as stated by the respondent." As I have shown, the facts if true would not be a sufficient response, but would be available only when the court comes to consider the punishment for disobedience. But, with all due respect, the Court of Appeals was not warranted in using the language quoted. The very contrary is the fair inference from the record. The referee's report on pages 26-7-8 of the record gives the dates upon which Comingor is shown to have appropriated the funds constituting this $3,398.90, and his later report (Rec., p. 31) details a culpable fraud on the part of Comingor in the administration of his trust. The first report shows that on the day before the petition in bankruptcy was filed Cominger appropriated $2,448.90; and no language of the referee justifies the inference that he "assumed that the facts were as stated by the respondent." On the petition for review the Court of Appeals, according to its own construction of the law, can only consider matters of law and not matters of fact. (Cunningham vs. German Insurance Bank, 103 Fed. 932; Courier-Journal Job Printing Co. vs. Schaefer-Meyer Brewing Co., 101 Fed. 699.)

The referee and the lower court adjudged the response insufficient—whether because they did not accept the same as true or whether after the hearing of evidence does not appear; nor can it be made to appear without a complete

transcript. For all this record shows the District Court might have deemed the response as "either fictitious or a manifest subterfuge," to use the language of Judge Seaman *in re* Mayer, 98 Fed. 841. Therefore the Circuit Court of Appeals had nothing upon which to base the ruling as to the sufficiency of the response, nor could it determine from the record before it whether the facts set forth in that response are true or false.

THE STATEMENTS IN THE RESPONSE ARE NOT BINDING UPON THE COURT OR REFEREE. THEY ARE NOT BOUND TO ACCEPT THEM AS TRUE.

In re Purvine, 96 Fed. 192, the bankrupt responded that $7,400 were lost or stolen from him.

In re McCormick, 97 Fed. 566, the bankrupt swore that $1,500 were stolen from his pocket or lost on a street-car.

In re Friedman, 1st National Bankruptcy News, page 332, the bankrupt testified that some $19,000 had been stolen from his pocket. Yet in all these cases the referee and the court refused to credit the statements, and orders, committing the bankrupts until they should pay the sums, were made. So in the case at bar, if it be assumed that it was proper for Comingor to plead his insolvency by way of response, nevertheless, the District Court might have been justified in refusing to accept the truth of his plea and in entering the order requiring him to pay. He cannot by his mere *ex parte* plea determine the question of whether or not a decree shall go against him, nor would the court, when the question of enforcing the decree comes up, accept his mere affidavit, but would, on the contrary, order or hold some investigation in order to ascertain the truth of his

plea, and when that truth should be ascertained, the proper action would be taken. The authorities cited by the Court of Appeals on pages 69 and 70 of the record do not militate against this view. They relate to the punishment for violating the orders previously made and not to the entry of the original decrees.

THE RESPONSE TO THE RULE TO PAY $3,000 INSUFFICIENT.

To the rule to pay to the receiver $3,000 claimed by Comingor to have been delivered to his attorneys for their services, he responded that said sum was paid to his attorneys while acting as his counsel; that he had no money or means of his own, and, further, that before the petition in bankruptcy was filed or before he had any knowledge or intimation that it was intended to be filed, and relying upon the expectation that he would be permitted to wind up his trust, he filed his petition in the State Court for a settlement, and that he is subject to the jurisdiction of the latter court. He nowhere claimed that the payments, or either of them, were in any way authorized by any court.

The sufficiency of the response as to the pendency of the suit in the State Court will be considered separately. Considering the rest of that response, I contend it is wholly insufficient. He does not claim that he demanded or requested his counsel to refund the money, nor does he claim that they are insolvent, or that he has taken any legal or other steps to obtain that sum from them. He paid it to them, and it is his duty to get it back. It looks like trifling with the court for him to file such a response, especially when it is shown in this record (page 52) that these same counsel agreed before the referee that if he would not certify them to the court for their

failure to return the money, they would honor any order which the court might make against their client Comingor. As stated in discussing the response to the rule to pay the $3,398.90, Comingor's insolvency would not constitute a sufficient response under any circumstances; but even if such fact were ordinarily sufficient, it could not avail him in this instance, unless he further showed that he had made every proper effort to repossess himself of the funds which his attorneys have. If this case is affirmed and the petition for a review denied, Comingor will still have an opportunity to recover the $3,000 from Messrs. Sachs, or else to show his inability to obtain it. And if he convinces the court that he has really spent the $3,398.90, and is unable to repay it, and further convinces the court that his counsel will not return and cannot be compelled to return the $3,000, surely the court will not punish him for his failure to do an impossibility; but, as above explained, the question of punishment has never arisen in the lower court, and I apprehend will not be determined on the petition for review until it has been first decided there.

The Decision of the Court of Appeals Might Exonerate the Assignee's Bondsmen.

Comingor gave bond when he qualified as assignee. If this fund is not recovered in the present proceeding, the trustee in bankruptcy will be compelled to institute an action in the State Court against Comingor and his bondsmen. Suppose this Court should hold that the District Court, whether by consent or otherwise, did have jurisdiction, but should further decide that the response of Comingor was sufficient, what might be the effect upon a plenary suit in the State Court against Comingor's bondsmen? They could plead in bar that the question of Comingor's liability had been adjudicated in

his favor in the Federal Court; and such a plea might be sustained. On the other hand, if the decree of the District Court is allowed to stand, Comingor's liability to refund said sums would be deemed as determined, and neither he nor his bondsmen could plead the merits of the claim in the State Court proceeding. The merits of Comingor's claim for compensation have been tried under the reference made by the judge to the referee on July 16th. (Rec., p. 29.) Evidence was introduced by the trustee and by Comingor concerning the extent of his services, the necessity therefor and the value thereof. He and two of his counsel testified on the occasion, and he made a stipulation about reading the testimony of other witnesses. (Rec., p. 32.) The referee reported adversely to the claim (Rec., p. 21), and the judge confirmed the finding of the referee, and in effect disallowed the claim by entering the order requiring Comingor to pay. (Rec., p. 40.) Comingor has had his day in court fully and completely, and nothing could be urged in the State Court in favor of his claim that was not urged in the Federal Court. The trustee, therefore, is anxious that the decision of the referee and the District Judge, establishing Comingor's liability for the funds which he appropriated, should be sustained; so that it may be binding upon the State court if hereafter the trustee brings a suit against Comingor and his bondsmen.

The Motion to Dismiss for Failure of Comingor to File a Complete Transcript of the Record Should Have Been Granted.

Rule 14 (3) of the Circuit Court of Appeals is in the same words as Rule 8 (3) of the Supreme Court. In Redfield vs. Parks, 130 U. S. 623, the court on its own motion refused to determine a case where the record was incomplete, and granted leave for the issuance of a *certiorari*. Surely, then, the Court

of Appeals should either have dismissed the case for want of sufficient record or have granted the motion to add to the record instead of denying said motion, as it did. (Record, page 58.)

The Jurisdiction of the State Court was Ousted by the Adjudication in Bankruptcy.

The assignment was made on December 5th. December the 8th the assignee brought a suit in the State Court to administer his trust. His object in going so speedily into the State Court was reported by the referee as a step in a scheme to defraud the creditors. (Rec., p. 35.)

The Circuit Court of Appeals in the Sixth Circuit in Leidigh Carriage Company vs. Stengel, 95 Fed. 637, opinion by Judge Taft, decided that the jurisdiction of a Federal court to wind up the affairs of a bankrupt is paramount. The court there said:

> "It is next objected in argument and the briefs, though we do not find an assignment of error specifically directed to the point, that the assets of this defendant bankrupt are in the hands of the assignee for the benefit of creditors, subject to the orders of the Probate Court; that the District Court in bankruptcy cannot obtain jurisdiction to administer the assets, which are in the course of administration and in the possession of officers of other courts. If this objection were to be sustained, it would seriously embarrass the enforcement of the bankruptcy law, and make it subordinate to the State insolvency and assignment laws, wherever an insolvent debtor who had committed an act of bankruptcy had placed his assets in the hands of the assignee, acting by State law under

the direction of the Probate Court. It is generally true that, as between courts of concurrent jurisdiction, the court which first obtains possession of the *res* must retain possession of it until the *res* has been finally disposed of, and any one else interested in the *res* must apply to that court if he desires relief with respect to the property in the possession of that court. But, as between District Courts sitting in bankruptcy and State Courts for the administration of insolvent estates, there is no concurrent jurisdiction. The Constitution of the United States, by giving to Congress the power to pass uniform bankruptcy laws, gives to the courts in which Congress shall vest this power paramount jurisdiction in bankruptcy proceedings. The orders in bankruptcy are, therefore, superior to those of a State insolvency court. Section 720, which forbids a court of the United States from enjoining proceedings in a State Court, expressly excepts bankruptcy proceedings. This is the plain intimation by Federal and paramount law, that where a Federal bankruptcy court shall take jurisdiction, there the State insolvency court must yield. Hence it is that the assignee for the benefit of creditors of the defendant company, the grantee in the deed, which is by the Federal law an act of bankruptcy, may be made a party in the bankruptcy court, and may be required to hold the assets of the bankrupt subject to the order of the District Court in bankruptcy."

Some of the lower courts have held that a general assignment is absolutely void because expressly declared a ground of bankruptcy, while others hold it is voidable until the adjudication in bankruptcy makes it entirely void. To hold that the State Court has jurisdiction to administer a trust, which by the adjudication in bankruptcy becomes void, seems

to me would be entirely untenable. If the assets of the bankrupt can be held in and administered by the State Court, the Federal court in bankruptcy would not be paramount as to those assets. In fact, unless the court in bankruptcy can obtain possession of and administer the assets, that clause of the bankruptcy law which makes it a ground of bankruptcy to make a general assignment, may be entirely inoperative so far as practical results are concerned. What was the object of Congress in declaring that the making a general assignment shall be a ground of bankruptcy? Manifestly it was to prevent the abuses and inequalities which result from the administration of the estates by the local courts. If, then, the jurisdiction of the State Court is not ousted by the adjudication in bankruptcy the purpose of that section of the bankruptcy law will be defeated. In the case at bar the State Court did order the funds in its repository paid over to the trustee in bankruptcy, but not until the officers of its court had been first paid their costs out of the same. To the extent that such costs were paid in the State Court that court and not the Federal Court administered the bankrupt's assets.

If the Trustee is compelled to resort to a plenary suit to recover this $3,398.90 retained by Comingor without leave of any Court and the $3,000 paid by him to his counsel, also without leave of Court, the State Court and not the Federal Court must determine the controversy as to these sums; and the State Court will then, to the extent of these two sums, be administering upon the assets of the bankrupt. And if the trustee brings such a suit or suits, he will be bound by the result of the decision of the court whose jurisdiction he himself invokes. Logically, it seems to me that one court or the other, the State or the Federal Court, should administer the whole estate.

I respectfully ask that the petition for review be denied.

AUGUSTUS E. WILLSON,

Counsel for the Petitioner, the Louisville Trust Company, Trustee, etc.

AUTHORITIES CITED.

Leidigh Carriage Co. vs. Stengel, 95 Fed., 637.

Bankruptcy Act, Section 2 (3 and 7).

Bryan vs. Bernheimer, (U. S. Sup. Ct., April 15, 1901).

In re Francis-Valentine Co., 94 Fed., 793.

In re Brooks, 91 Fed., 508.

In re Kenney, 95 Fed., 427.

In re Moore, 104 Fed., 869.

In re Smith, 92 Fed., 138.

In re Stokes, 106 Fed., 313.

In re Steuer, 104 Fed., 976.

Cunningham vs. German Insurance Bank, 103 Fed., 932.

Courier-Journal Job Printing Co. vs. Schaeffer-Meyer Brewing Co., 101 Fed., 699.

In re Meyer, 98 Fed., 841.

In re Purvine, 96 Fed., 192.

In re McCormick, 97 Fed., 566.

In re Friedman, 1 National Bankruptcy News, 332.

U. S. Supreme Court Rule 14 (3).

Circuit Court of Appeals Rule 8 (3).

Redfield vs. Parks, 130 U. S., 623.

No. 309.

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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Nov. 6, 1901.

The Louisville Trust Company, Trustee, Etc.,

vs.

Leonard Comingor.

Supplemental Brief for Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

RESPONSE TO BRIEF FOR COMINGOR.

AUGUSTUS E. WILLSON,
For Louisville Trust Company,
Trustee in bankruptcy of Simonson, Whiteson & Co.

C. H. DORESSEUR PRESS, LOUISVILLE

No. 309.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE LOUISVILLE TRUST COMPANY, TRUSTEE, ETC.

vs.

LEONARD COMINGOR.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Supplemental Brief for Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co.

RESPONSE TO BRIEF FOR COMINGOR.

In the brief for Comingor, p. 13, "Points of Law" 1, and pp. 14 and 15, "Argument," counsel for Comingor, without notice or motion to dismiss, insists that the judgment of the Circuit Court of Appeals should be affirmed or this appeal dismissed, claiming that the appellant or petitioner has not brought up the record as required by the rules.

Petitioner has brought up the entire record, and the only basis of this argument is the wording of one of the clerk's certificates. Rule 8, sub-divisions 1 and 3, requires the Clerk of the Circuit Court of Appeals to make return to the writ of error

by transmitting "a *true copy of the record* and of the assignment of errors *and all of the proceedings in the case* under his hand and the seal of the court," and that "no case will be heard until *a complete record*, containing in itself, and not by reference, all the papers, exhibits, depositions and other proceeds which are necessary to the hearing in this Court, shall be filed.

And counsel for Comingor insist that the certificate, on its face (R., page 71), shows that he has not done this.

We tender a supplemental brief, because this is the first notice of this point, which was not contemplated in the brief already filed for petitioner.

1. The record, page 70 (*91), has the certificate of the Clerk, as follows:

> "I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify *that the foregoing is a true and correct copy of the record in the case entitled in the matter of the petition of Leonard Comingor to review an order of the District Court of the United States for the District of Kentucky, No. 943, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.* In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 24th day of May, A. D. 1901."

This certifies that the record to which this certificate is appended is, in the language of Rule 8, sub. 1, a true copy of the record, and the certificate on page 71 relied on for Comingor shows that it is "a *true, full and complete copy of the proceedings* in said court in the cause and matter in the said

writ of certiorari stated." And therefore the certificates of the clerk clearly comply with the rule.

If the record has not all that should be in such a record, the fault is not with the trustee, petitioner here, but with Comingor, who made the record in the Circuit Court of Appeals by merely filing a petition and a number of extracts, self-selected, *ex parte*, for his own purposes from the records, not only of the bankruptcy court, but also parts of the record in a case in the State Court never part of the bankruptcy record and several original assertions as to facts not in either record.

The trustee objected to this record in the Circuit Court of Appeals as not complying with the rule. At page 41 is the motion made by the Trustee in Bankruptcy in the Circuit Court of Appeals "to dismiss the petition" (filed in that court for review), "because the petitioner, Leonard Comingor, has not filed herein a complete record containing in itself, and not by reference, all the papers, notices, depositions and other proceedings which are necessary to a hearing in this Court, and that no true copy of the record has been transmitted by the Clerk of the District Court of the United States under his hand and seal, as required by the rules of this Court."

At the foot of this motion is the Clerk's memorandum that it was filed February 12, 1901, and below that follows the notice, duly served on Comingor, that the motion would be made on that day, and this notice is filed on the same February 12th. There was no order of the Circuit Court of Appeals making the records on the two former appeals in the Simonson, Whiteson & Co. bankruptcy case a part of the record of the Court of Appeals in this proceeding, and the only reference to either of them was in the petition of Leonard Comingor for review, page 2, end of second paragraph: "All of the matters herein so far referred to appear

in records Nos. 716 and 777, in this Court, and are referred to as part hereof."

The notice, page 41, was that the Trustee would move the court, to dismiss Comingor's petition for review of the Bankruptcy Court decision ordering him to pay in the money and not to hear the case because a complete record had not been filed, and that in the event the court overruled the motion would move the court not to hear the case until such complete record should have been filed. Together with the motion to strike out, etc., which the record, at page 45, shows was filed February 12, 1901, pages 42–45, the Trustee objected to advancing the hearing and setting the case in that February term, or submitting the petition for review in the Circuit Court of Appeals and suspending the judgment in the District Court in bankruptcy, or to suspending proceedings against Comingor, and moved to dismiss the petition for review, and objected to the Circuit Court of Appeals proceeding therein, moved that court to refuse the petition of Comingor for review "because said petitioner has not filed, nor does he claim in said petition to file, a transcript of the whole record and proceedings in which he claims there was error . . . and because the court has no jurisdiction in the matter except appellate jurisdiction, and said petitioner has attempted to institute in this Court an original action, *selecting such parts of the record as he deems material and omitting all of the testimony taken in said proceeding.*"

Then followed motions to strike out certain parts of the petition for review in the Court of Appeals, which were original allegations not based on any record in the bankruptcy court or Court of Appeals, and this motion was supported by an answer and affidavit for the Trustee (p. 45) which traversed many allegations of the petition for review, which were not supported by any of the selected fragments of records in different courts, filed with that petition, and set up many matters

which were affirmative defense to the proceeding for relief, as set up by this petition for review, which was drawn in the form of an original petition, making original allegations that Comingor was dropped from further consideration in the case, etc., and not, strictly, an appellate proceeding.

At page 48 this answer alleged:

"That the opinion of the Referee accompanying the report, Exhibit No. 18, is material to the proper determination of this action and has been omitted."

At pages 51-2 we showed a large number of depositions taken in the court below, but not included in the record presented with this petition for review, and that it was necessary and material to the consideration and proper decision of the cause and of the petition of Comingor for review, for the court to know all of the acts and doings of Comingor in the said proceedings before the District Court and the Referee in bankruptcy, in order to show the fact . . . that said Leonard Comingor . . . never made any application to any other court than said District Court in bankruptcy for any allowance out of the funds which he held as assignee of Simonson, Whiteson & Co. for compensation for his own services or those of his attorneys, and never had any allowance by any court therefor, and never had any title or claim to hold any of said moneys of said bankrupt firm, collected and received by him in any capacity, except as assignee and trustee for the benefit of creditors of said firm, and can not claim here that he had converted or appropriated any of said funds collected, received or held by him as trustee, without asking the court to believe him guilty of unlawful, wrongful and unpermitted misappropriation and conversion of said trust funds in his hands to his own use in order to defeat the jurisdiction of the said District Court and Referee in bankruptcy; and that he can not plead or claim any adverse title or any personal

right of any kind to any of said funds, which he now claims to have retained for his compensation and the compensation of his counsel, without pleading his own wrong and breach of trust in order to exclude the jurisdiction of the said District Court and Referee in said bankruptcy proceeding, and that he never did make any such claim or any claim that he had any right to retain any part thereof, or that the State Court or any court had ever made him any order of allowance of any part thereof, nor did his said lawyers, M. A., D. A. & J. G. Sachs, make any such claim, but on the contrary his said lawyers expressly agreed before the Referee that if the Referee would not report them to the District Court for failure to comply with the rule for them to pay in the $3,000.00, that they would pay any order made against the assignee, Leonard Comingor (which they have heretofore failed to do), and that said assurance was given by said M. A., D. A. & J. G. Sachs through M. A. Sachs in the presence and with the permission of Leonard Comingor, petitioner herein . . . and that if a transcript of the record . . . and especially the depositions, were filed as part of the appellate proceedings of the petitioner in this Court, they would show the facts found by the Referee; that the said petitioner had not managed the said estate faithfully nor for the best interest of the creditors, but had colluded and combined with the bankrupts and certain favored creditors of the bankrupts to sell property of the bankrupt estate amounting to a great sum, to wit, $60,000.00, for the sum of $15,000.00 under an arrangement and agreement by which the favored creditors were to be paid fifty cents on the dollar, and the surplus of the proceeds of that operation, after paying such creditors fifty cents on the dollar, which was afterwards fixed at payment in full, should be divided between the bankrupts, and that, after said arrangement was carried out, a large sum was

divided among the bankrupts as profits of the wrecking of their business, and . . . was made possible by the unfaithfulness of said assignee to his duty as trustee," etc.

The answer specified the parts of depositions and certain parts of the record and proceedings before the District Court and Referee which were necessary to a correct understanding and determination of the issues (pages 53-4), and the Trustee prayed the court to require the petitioner, Comingor, to supply said omitted parts of the record, or to file herein a complete transcript of the record, of all of the pleadings, orders, proceedings and evidence in said District Court, and before said Referee in bankruptcy in the matter of said proceedings against Leonard Comingor, assignee. This answer was sworn to and filed February 12, 1901, in the Circuit Court of Appeals.

The order of the Circuit Court of Appeals (page 57) recites that the trustee filed a notice, the motion referred to therein and the motion to dismiss on grounds set up in the motion and to strike out parts of the petition (the original allegations, clearly improper in appellate proceedings for review), and also answer and affidavit of the trustee for a writ of certiorari for diminution of the record, and thereupon the Circuit Court of Appeals, on Comingor's motion, suspended the execution of the District Court order, and at pages 58-9 denied the motion to dismiss the petition and to add to the record, and finally reversed the judgment of the District Court.

ARGUMENT.

This was an *original* proceeding in the Circuit Court of Appeals, begun by "petition for review," and there was no record in that court in this proceeding, except the proceedings begun and had there, all of which are here complete. The Clerk of the Circuit Court of Appeals, in his return to the writ of certiorari, could not certify more than he did. There was no record in the Circuit Court of Appeals in this proceeding, except the proceedings begun and had there. His certificate in the return recites that "a true, full and complete copy of the proceedings in said court in the cause and matter in said writ of certiorari stated" is returned pursuant to the command of the writ. What more could be returned in that case? "Record" would be only a synonym for the "proceedings" in this Court, and we submit that they can not ask the court to say, on the return to a writ of certiorari, in an original proceeding in the Circuit Court of Appeals, where there is no other record than the proceeding in said court, that said certificate is insufficient, especially when they do not point out a single paper material to the case that is omitted from the record; but if the court should be of the opinion that there should be further return, we hope the court will order a new return if the one already made is not sufficient, for this is not a writ of error or appeal which expires by limitation, and Comingor has not moved the court to dismiss for failure to show proper return to the writ.

The court has frequently rebuked the including immaterial papers in the record, and in Ball & Socket Fastener Co. vs. Kraetzer, 150 U. S. 118, taxed costs for incorporating such papers, as they did in R. R. Co. vs. Stewart, 95 U. S.

284. If any paper is omitted from the record, it should be brought to the attention of the court by an application for a writ of certiorari for diminution to bring that paper up. Such writ would be denied for any immaterial paper. Union Pacific vs. W. S., 116 U. S. 402.

Certificates have been permitted to be amended, Idaho & Oregon Imp. Co. vs. Bradbury, 132 U. S. 509, and the court, as we understand the rule in Schulte vs. R. R. Co., 100 U. S. 644, will not dismiss the case, especially when there is no motion for diminution nor to dismiss, on a mere suggestion in appellee's brief, without notice or previous application, without permitting the petitioner to bring up any material papers that are omitted.

The other records in other former appeals, referred to in the petition for review, were not read in this case, and are not proper parts of the record in this case. We took all of the record there was in the Circuit Court of Appeals to this Court on the writ of certiorari, and the first appeals in the bankruptcy case had nothing to do with the questions raised on Comingor's petition for review. They are different cases. The writ of certiorari to remove this case took up only the proceedings in this case in the Circuit Court of Appeals. For aught this Court knows, there might be fifty other petitions, appeals or writs of error, and if reference to them in a petition for review could make any number of such records part of the records in a case, without any order of the Circuit Court of Appeals reading such records in the case, or making them part of the record in this case, then it would be entirely practicable to defeat any such application for review of such decision in the Circuit Court of Appeals by referring to such a number of records, say, all the records in the Circuit Court of Appeals; that it would be impracticable to get them printed.

We submit that the jurisdiction of the Circuit Court of Appeals on the petition for review should have been an appellate proceeding, based only on the record in the one case sought to be reviewed, and should have presented all the record of the lower court that was necessary to a proper determination of the question then before the court; but the Circuit Court of Appeals failed to strike out the new original allegations not based on the record and refused to require the rest of the record to be brought up, and decided the case purely on the one legal proposition, that this proceeding to require a State court assignee to pay the funds in his hands into the Bankruptcy Court, after adjudication in bankruptcy, must be by a plenary suit, and could not be by a summary proceeding by rule and attachment, and, assuming that proposition to be true, the court regarded the merits as not involved, and that it was immaterial whether the assignee had acted in bad faith or not, or whether he deserved anything or not, or that the assignee, who held the money solely as trustee, who had never applied to any court for its allowance to him as compensation for himself or his attorneys, who had never had any order allowing it, but held it solely as assignee and officer of the court, could set up and maintain an adverse claim to that money, nor what else was or was not in the record.

The trustee in bankruptcy urged that Comingor was simply an officer of court; that he had applied to the referee and the District Court to allow him the amount in controversy; that he had never applied to any other court, and that he could not set up an adverse claim to the court funds without relying upon his own wrong, and that there was no need of a plenary suit, as there would be against a third party claiming the money in his own right and not an officer of the court, and that the Bankruptcy Court was the only court

that could consider the matter of an allowance to him; that the State Court could not longer do so, because all jurisdiction over the fund ended with the adjudication in bankruptcy, leaving it, as the necessary result, for the Bankruptcy Court to pass on any allowance to the assignee for expenses and services as assignee in the State Court.

We submit, then, that our motion in the Circuit Court of Appeals to dismiss the appeal for failure to bring up the complete record should have been sustained, and we submit to the court our request for such declaration here.

Counsel for Comingor insist that the Referee had no jurisdiction to appoint a receiver except upon application of the parties. We submit that the court can not tell whether the Receiver was not appointed upon application of the parties. The complete record is not here, nor was it in the Circuit Court of Appeals, so that the court can not tell here, in the absence of the rest of the record, whether the missing parts did not contain such an application, and as the whole record is not before the court, we ask the court, as a matter of law, to assume that the Referee first and then the District Court acted lawfully and within the jurisdiction conferred by law.

Upon the proposition that the Referee did not have the right to appoint a Receiver, we submit that Section 38 (4) of the Bankruptcy Act, which authorized the Referee to "perform such part of the duties, except as to . . . compositions or discharge, as are by this act conferred in Courts of Bankruptcy, etc.," authorized the Referee to perform all of the duties of the Judge, with certain exceptions, of which the appointment of a Receiver is not one, and that either the court or Referee did have jurisdiction to appoint a Receiver. The Receiver was appointed temporarily before there was time under the law to appoint the Trustee. This

jurisdiction to appoint a Receiver existed with or without the application of the parties, so that even if no application had been made, the jurisdiction to appoint existed, whether the parties applied for it or not, and if the appointment was within the jurisdiction Comingor was bound to obey the order.

But the point is made that the Referee had no power to appoint a Receiver except "upon application of parties in interest," citing Section 2 (3) of the Act. If this were the only provision upon the subject of the jurisdiction of the court, the point might be well taken, but Section 2 (7) gives the court power "to cause estates of bankrupts to be collected," etc., and the closing paragraph of Section 2 is in these words: "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated." It has been repeatedly held that a bankruptcy proceeding is in the nature of an equity proceeding, and not an action at law. In re Wallace, 2d National Bankruptcy Reports, 52; Federal Cases 17094. Surely the appointment of a receiver is an equity proceeding and not one at law, and Section 2 gives the bankruptcy court jurisdiction in equity as well as at law. The right to appoint a receiver exists in a Court of Equity upon motion of parties or *sua sponte*, and as all such rights are, by the quotation last made, expressly reserved to the bankruptcy court, it seems to us that this inherent right in equity to appoint a receiver is not taken from the court, but is expressly preserved to it. Hence we submit that under the clause authorizing the Court or Referee to cause estates of bankrupts to be collected, coupled with the clause that nothing in Section 2 shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not enumerated, it is clear that in the exercise of the ordinary

equity powers a receiver may be appointed with or without application of the parties.

The statement on page 24 of the brief that Comingor had appropriated the money to his own use and to that of his counsel may be literally true, but the law does not suffer him to assert it in a pleading as a matter of defense to the court's rule for him to pay in the moneys held for the court. He was holding it for the State Court and its successor by operation of the law, the Bankruptcy Court, as assignee, and as the Circuit Court of Appeals said, *re* Francis Valentine Co., and as this Court has declared in like cases, his possession as assignee was not in opposition to the right of the bankrupts nor in antagonism to the title of the bankrupt, or of the bankrupt estate or the trustee in bankruptcy, but depended wholly and was based entirely upon the assumption that the title was in the bankrupts, and legally in custody of the court, not the assignee, and therefore he could not be heard to say that his holding under the court was adverse to the court. Besides, his response set up no adverse holding, and the bare allegation of the conclusion of law that he holds it adversely does not change the real legal status, as the facts in the case show that he was not holding it adversely, but that he obtained possession of these moneys and collected them as assignee under the State law and the State Court, for the benefit of the bankrupt estate and its creditors, and that was not antagonistic to the bankrupts' claim or the claim of its creditors through the trustee in bankruptcy. The assignee as an officer of the courts can not question the title or power of the courts over the funds, which he holds under that power alone, and when the court decides to order the money held for it to be paid in, the law does not permit him to plead in the court for which he is

acting, the only court which has the control, the court to which the State Court's control passed by operation of law, upon the adjudication in bankruptcy, that he has converted or used the court money for his private purposes. The State Court would not permit such defense if it still had control, and the bankruptcy court has all of the power which the State Court had before it, and the assignee must answer to the bankruptcy court just as he would have had to answer to the State Court.

Respectfully submitted.

AUGUSTUS E. WILLSON,

For Louisville Trust Company,
Trustee in bankruptcy of Simonson, Whiteson & Co.

No. 309.

Petition for Rehearing.

Supreme Court of the United States

Rec'd & Distributed Feb. 12, 1902

OCTOBER TERM, 1901.

No. 309.

The Louisville Trust Company, Trustee, Etc., Petitioner,

vs.

Leonard Comingor.

PETITION FOR REHEARING.

AUGUSTUS E. WILLSON,
Counsel for Petitioner.

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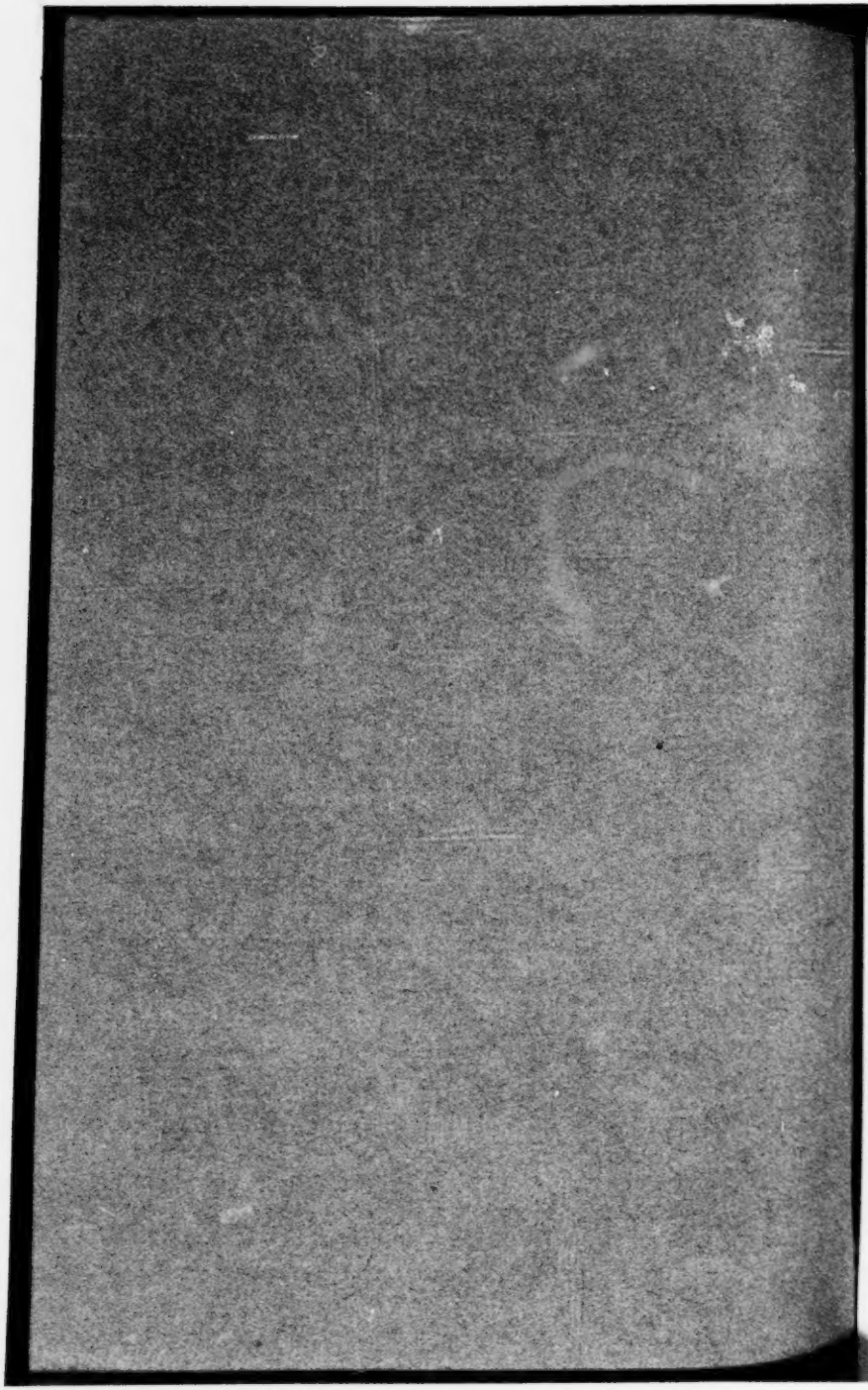

No. 309.

Supreme Court of the United States.

OCTOBER TERM, 1901.

THE LOUISVILLE TRUST CO., TRUSTEE, ETC., . *Petitioner*,

vs.

LEONARD COMINGOR.

Petition for Rehearing.

The Louisville Trust Company, Trustee of the estate of Simonson, Whiteson & Co., Bankrupts, respectfully petitions this Honorable Court for a rehearing, and for ground of such petition shows:

The sole question in the case, being perhaps a mixed question of law and fact, is this: Was Comingor, to whom the assignment had been made by the bankrupts of all their property under the State law, an adverse holder of the sums of $3,200 and $3,398.90 which, by the district court, he was ordered to deliver to the trustee in bankruptcy?

Almost immediately after the assignment was made the assignee, Comingor, brought his suit in the State court for settlement of his accounts, and under the directions of the court he converted the assets into money. Under the law of Kentucky no stipulated commissions are paid to assignees, the courts allowing only what they may deem reasonable. Until an allowance is made by the court the assignee is

merely the custodian of the fund for the State court, but without any allowance having been made.

Comingor retained an arbitrary amount for his commissions and paid an arbitrary sum to his counsel. The district court held that as Comingor had invoked the jurisdiction of the State court to administer the whole fund, the fund became in *custodia legis*, and therefore that he, Comingor, would not be permitted to say that he held any part of said fund in a capacity different from that recognized by law, and consequently it was decided that he was not and could not become an adverse holder of the fund or any part of it; that he could not, by unlawfully converting the funds to his own use or to the use of his counsel, change the character of his holding from that of assignee to that of adverse holder. Had the State court entered orders allowing these sums to Comingor for his own use and for the use of his attorneys, then he or they might have asserted some individual or colorable title; but holding it merely as the arm of the court, his custody was that of agent only, and it must so remain until a judgment of the court changed the nature of such holding. It has been decided by the Circuit Court of Appeals for this circuit in Leideigh Carriage Co. vs. Stengel, 95 Federal, 637, and also *in re* Lengert Wagon Co., 110 Federal, 927, that the adjudication in bankruptcy ousts the State court of jurisdiction. If this be true, any further steps in the suit which Comingor brought for settlement would be void, because taken in a court which has lost jurisdiction. Hence Comingor can not obtain a decree allowing him any fees, nor can the trustee raise the question of those fees in the State court. If this be not true, if the State court still has jurisdiction to pass on any allowances to Comingor and his attorneys, then that court and not the

bankruptcy court will be administering upon part of the estate in bankruptcy. It has been repeatedly held, under the present law, that neither the assignee nor his counsel is entitled to any commissions or fees where the estate is placed in the bankruptcy court.

In re Pauly, 1 National Bankruptcy News, 405.

Stearns vs. Flick, 2 N. B. N. & R. 1046.

In re McCauley, 2 N. B. N. & R. 1089.

In re Bussey, 3 N. B. N. & R. 928.

In re Tatem, Mann & Co., 4 N. B. N. & R. 83.

It follows, then, that Comingor has not even a colorable title to this fund. If the trustee should be compelled to bring an independent suit in the State court, and that court should allow these fees, it would be in conflict with the Federal law. Surely an adverse holding must be based upon some sort of *bona fide* and colorable title. Suppose a thief had broken into the store and carried away goods held by the assignee; suppose after the adjudication in bankruptcy the trustee had obtained a rule against that thief to deliver those stolen goods; suppose the thief had responded that he had stolen the goods from the assignee before the petition in bankruptcy was filed, could, under these conditions, the court have held that the thief was an adverse holder and therefore not liable to summary process?

So with Comingor. He knew that his title as assignee was uncertain; he knew that bankruptcy would divest him of that title; he knew that he was entitled to no fees and that his attorneys were entitled to no fees until the State court, by which the assets were being administered, should allow them, and he is presumed to have known that if his assignors should be adjudged bankrupts on account of the assignment, neither his attorneys nor himself would be entitled to any fees at all. Yet with all these facts staring him in the face,

he sought to cheat the law and the creditors by appropriating to his own use and to the use of his attorneys about $6,500 of money which he held only as assignee and as agent of the court, and not in his own right, and then he declares to the Federal court: "You have no jurisdiction of me; no right to rule me to pay over this money, for I have misappropriated it and thereby shifted my attitude unlawfully from that of trustee and agent to that of adverse holder." If he can do this; if he can, without the slightest color of law, constitute himself an adverse holder, as to part of the fund, while it is in *custodia legis*, and while he is the court's agent for holding it, why may he not do the same as to all the fund and thereby render wholly inoperative that ground of bankruptcy which was pleaded in this cause?

A holding to be adverse must "involve the element of hostility under a claim or color of title." (Eastern Oregon Land Co. vs. Cole, 92 Fed. 952.) A tenant can not dispute his landlord's title. Can an assignee, the agent of the court and the law, without legal warrant, set up an adverse claim to the fund in his keeping?

It is respectfully submitted that possession alone does not constitute adverse holding; it must be possession accompanied with *some* show or color of right, such as existed in the case of Marshall vs. Knox, 16 Wallace, 551, where the custodian held the property to satisfy a *bona fide* lien for rent. This case might be compared to the position of a receiver of the court. A receiver is but an arm of the court. The assignee, Comingor, was the same. If the court had removed Comingor and appointed another assignee—a by no means uncommon proceeding in Kentucky—could not the court by summary process compel him to turn over the whole fund to the new assignee?

Is not the trustee in bankruptcy the equivalent of a new assignee, even if appointed by a different tribunal? Is he not the successor to the right and title of the assignee? And having succeeded to Comingor's rights and stepped into his shoes, can Comingor, as against this trustee, or new assignee, set up an adverse holding, especially when not even claimed to be based upon any law, allowance or judgment of the court?

Your petitioner respectfully prays for a rehearing.

AUGUSTUS E. WILLSON,
Counsel for Petitioner.

I, Augustus E. Willson, do hereby certify that in my opinion the foregoing petition is well founded in fact and in law, and should be granted.

AUGUSTUS E. WILLSON.

Augustus E. Willson

Filed Oct. 26, 1901.

In the

Supreme Court of the United States

OCTOBER TERM, 1901.

THE LOUISVILLE TRUST COMPANY, TRUSTEE, ETC., v. LEONARD COMINGOR.	No. 809. On writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR LEONARD COMINGOR.

In the

Supreme Court of the United States

OCTOBER TERM, 1901.

THE LOUISVILLE TRUST COMPANY, TRUSTEE, ETC., v. LEONARD COMINGOR.	No. 309. On writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR LEONARD COMINGOR.

STATEMENT OF THE CASE.

On the 14th day of February, 1899, Sinsheimer, Levinson & Co., and others, filed their petition in the District Court of the United States, at Louisville, against Simonson, Whiteson & Co., seeking to have said defendants adjudged bankrupts, alleging that on December 5, 1898, they had made a deed of assignment of their property, for the benefit of their creditors generally, to Leonard Comingor, who was made a party defendant to said petition, but no relief was sought or prayed as against him, and on March 21, 1899, he moved the

court to dismiss said petition as to him, because the court had no jurisdiction, and without waiving said motion, tendered an answer, but the motion was never acted on, nor was his answer ever filed, but his name was simply dropped out of the case, by common consent.

To this petition defendants, Simonson, Whiteson & Co., tendered answer, which was afterwards filed, and on the 20th day of September, 1899, said defendants were finally adjudged bankrupts, and on May 17, 1900, the case was referred to Baskin, referee.

Said referee, on May 28, 1900, without notice, entered an order directing said Comingor to file an itemized statement of his receipts and disbursements as such assignee, and to appear before said referee to settle his said accounts, and said Comingor did then furnish said referee said statement, as required, and the same showed that he realized from said assets $92,865.77, before the filing of the proceedings in bankruptcy, said amount being more than 22 per cent over the appraised value of said estate. That he had disbursed thereof $19,876.73; that he drew as his commission $3,398.90, and paid his counsel $3,200.00; *all before any proceedings in bankruptcy*

On June 20, 1900, the referee, on his own motion, entered an order appointing The Louisville Trust Company receiver.

Said Comingor having a suit then pending since

1898, in the Jefferson Circuit Court for the settlement of his trust, and having paid the net amount collected into court, the said referee, on June 20, 1900, directed said receiver to apply to said court for said entire fund.

On June 21, 1900, a notice was served on said Comingor that said receiver would that day make a motion in the state court (Jefferson Circuit Court) to withdraw said fund, and at the same time he was served with an injunction issued from the district court, enjoining and restraining him from making any opposition to said motion. Said motion was then entered in the state court, and on June 30, 1900, was refused, because said receiver was not a party to said suit. On July 3, 1900, said receiver, having been appointed trustee, filed his petition in the said settlement suit of said Comingor pending in the state court, and asked to be made party defendant thereto, and that said petition be taken as his answer, and that he be allowed to withdraw said fund; and on July 5th all this was done and the fund withdrawn.

Said referee on said June 20, 1900, on his own motion, made an order requiring said Comingor and his counsel to appear three days thereafter, and show cause why they should not pay over to said receiver the sum held by them as commission and fees, amounting to $6,766.53, not paid into the state court.

On June 23, 1900, said Comingor filed response

before the referee to said rule, said response is found on page 15 of the record, in the following words and figures, to wit:

> "L. Comingor for response herein to the or-
> "der to pay $3,398.90, says that as shown in
> "his report herein he retained the same on ac-
> "count of his commission as assignee, before
> "any bankruptcy proceedings, relying upon
> "the fact that he would be entitled to more
> "than that sum on final settlement; that for
> "the services rendered the estate herein he
> "believes that this Honorable Court will, on
> "final hearing, allow him at least said
> "amount; that he is a man of no means, has
> "used of said money, from time to time, rely-
> "ing upon its being his, until he has none of
> "it left.
>
> "He says that he is unable to pay said
> "money into court, having neither money nor
> "property of any kind. He says that he has re-
> "cently made efforts to borrow or raise money
> "and finds it impossible to do so. He asks the
> "court for such relief in the premises as the
> "court deems proper."

On the filing of said response the referee held same insufficient, and made the rule absolute, and ordered Comingor to pay to the receiver before June 30, 1900.

On June 28, 1900, said referee, without notice or appearance, made another "show cause" order against Comingor, requiring him to pay June 30,

1900, to the receiver $3,200 paid his counsel, before any bankruptcy proceedings.

On June 30, 1900, said Comingor filed the following response thereto (Record, p. 17), to wit:

"L. Comingor for response to the order herein to show cause why he should not pay the receiver in bankruptcy herein the sum of $3,000 shown in his report as having been paid M. A., D. A. and J. G. Sachs, and $200 to Zach Phelps, Esq., says that said sums were paid them respectively for services rendered him as his counsel whilst acting as assignee before any proceedings herein, as already appears in his report herein. He says further that he has no money or property or means of any kind with which to pay said money or any part thereof, and refers to his former response herein as part hereof. He respectfully submits to the court that he ought not to be compelled to pay said money herein.

"The respondent says further that long before the petition in this proceeding was filed and before he had any knowledge, information or intimation that it was intended to be filed, and relying upon it that he would be permitted to wind up his trust under the deed of assignment for the bankrupts shown in the record in this action or proceeding, he filed and brought his action in the state court as appears in this record, which is still pending and he is still subject to the jurisdiction and orders of said state court requir-

"ing him to settle his accounts there and to "be responsible there for all his acts and do- "ings under said deed of assignment. He sub- "mits to this Honorable Court that this re- "sponse be held sufficient and that the 'show "cause' order herein should be annulled or "suspended until he is relieved from his pres- "ent embarrassing position."

The referee, thereupon, held said response insufficient and made said rule absolute.

Thereupon, on June 30, 1900, said Comingor filed his petition before the referee for review by the district court (see Record, p. 26), and said referee, having filed his report, on the 16th of July, 1900, the court referred the matter back to the referee, with directions to take testimony as to character of services of Comingor and his counsel, and value thereof to the bankrupt estate, etc., and on the 10th day of November, 1900, said Comingor filed an additional response before the referee (see Record, p. 29), which is as follows:

"Leonard Comingor amends his response "herein to the orders to pay $3,398.90 and $3,- "000.00, and for amendment says that as "shown by the pleadings, record and evidence "in this case taken, and the entire proceedings "had herein, neither this court nor the referee "in bankruptcy herein has any jurisdiction "either of this respondent or the matter in- "volved, to make any such orders or require

"respondent to answer thereto, because he "says the records herein show that all trans- "actions with reference to said two (2) sums of "money took place before the petition in bank- "ruptcy was filed herein, and that neither "this court nor the referee in bankruptcy can "proceed against this respondent as herein at- "tempted by order or rule to pay or by sum- "mary process.

"He says the summary proceedings pro- "vided for in the present Bankrupt Act (Sec. "29, Subsec. b), relates to the bankrupt alone "where he conceals from the trustee while a "bankrupt or after his discharge, any prop- "erty belonging to the estate in bankruptcy. "This does not include third parties, but re- "lates to the bankrupt alone, under Subsec- "tion 4 of Section 29 of said Bankruptcy Act, "it is made an offense for any person to receive "any material amount of property from a "bankrupt after the petition in bankruptcy "was filed. Under the present act, except in "cases coming under one of the two (2) above "named subsections, neither the court nor the "referee has the authority (jurisdiction) to "compel the payment of money in the sum- "mary way provided for under Section 41; "that is, by order.

"Where third parties fraudulently with- "hold assets of the bankrupt, obtained before "the filing of the petition in bankruptcy, the "trustee is remanded to his right of action "under Section 23 of the act. Under that "section (23) neither this court nor the referee "has jurisdiction to proceed as herein at-

"tempted by order to pay or by rule or con-
"tempt process to enforce said order. He
"asks that said rule be discharged and said
"orders to pay be set aside and for his costs."

On December 11, 1900, the referee reported said matter back to the district court, and while this matter was pending before the district court, on December 22, 1900, *said additional response* was filed before the court.

On January 19, 1901, the district court filed an opinion on said review, and on January 26, 1901, the following judgment was rendered thereon (Record, p. 40), to wit:

"This case coming on to be heard on the pe-
"tition of Leonard Comingor for review of the
"order of court entered herein by John B.
"Baskin, one of the referees of this court, re-
"quiring Leonard Comingor to pay over to the
"Louisville Trust Company, trustee in bank-
"ruptcy, herein, the sums of $3,398.90 and $3,-
"000.00 and the court being fully advised, de-
"livered a written opinion which was filed
"herein, on January 19, 1901, and in pursu-
"ance of said written opinion, it is considered,
"ordered and decreed by the court that said
"petition for review filed by said Comingor,
"June, 1900, is refused and dismissed, to
"which said Comingor excepts, and it is ad-
"judged and ordered by the court that said
"Comingor pay to said Louisville Trust Com-
"pany, trustee, the said sums of $3,398.90 and

"$3,000.00, on or before February 16, 1901, to "all of which said Comingor excepts."

And then a petition for review was filed in the Circuit Court of Appeals by L. Comingor.

The errors complained of are fully set forth on pages 6, 7 and 8 of the record, and are as follows, to wit:

* * * * *

"Your petitioner further shows that he is "aggrieved by the orders of said district court "and injured thereby and that the errors com- "plained of consist:

"I.

"In said court holding that the referee and "said court had jurisdiction and power to pro- "ceed against petitioner, Leonard Comingor, "in the summary way had, he being a third "party, and not one of the bankrupts.

"II.

"In said court holding that it had jurisdic- "tion and power upon the proceedings, orders "and recommendations of the referee had, to "adjudge said Leonard Comingor in contempt "and to punish him for contempt.

"III.

"In said court holding that the referee had "jurisdiction and power to proceed against "said Leonard Comingor in said summary "manner had.

"IV.

"In said court holding that said Leonard "Comingor held said money for the bankrupts "and could be proceeded against in said sum- "mary manner had.

"V.

"In said court holding that it had the power "and jurisdiction herein to grant or issue the "injunction against Leonard Comingor.

"VI.

"In said court holding that said referee "had the power or jurisdiction to issue said "show cause orders or rules thereon or to pro- "ceed against said Leonard Comingor in the "manner had upon said orders issued.

"VII.

"In said court holding that the filing of said "responses of Leonard Comingor gave said "referee or court jurisdiction or power to pro- "ceed thereon in any manner in said matter, "or in the manner had.

"VIII.

"In said referee and said court adjudging "said responses and each of them insufficient.

"IX.

"In said court finding the facts to be and "adjudging that said sums of money were the

"property of the bankrupts' estate, and that "said Leonard Comingor never claimed title "to any of it nor made any claim of right to "it, or ownership thereof at any time, and "that he had never claimed to have converted "it to his own use, or to have claimed it ad- "versely to the bankrupts or the trustee or the "receiver in bankruptcy.

"X.

"In the court's adjudging that said money "was not converted by Leonard Comingor to "his own use, but held for the benefit of the "trustee.

"XI.

"In the court's adjudging that said Leon- "ard Comingor was properly before the court "in said proceedings.

"XII.

"In the court's failing to dismiss said con- "tempt proceedings against Leonard Comin- "gor and discharging him.

"XIII.

"In the court's finding as a fact and ad- "judging that said Leonard Comingor was a "party to this proceeding in bankruptcy.

"XIV.

"In the court adjudging and ordering said "Leonard Comingor to pay said sums of money "to the receiver (who afterwards became the

"trustee in bankruptcy) in the summary man-
"ner had, after ordering said receiver and
"trustee to make itself a party to the state
"court proceeding which was done, and the
"receiver and trustee became a party to said
"suit in the state court and withdrew all the
"money paid into the state court by said
"Leonard Comingor.

"XV.

"In the court holding that the proceedings
"herein against petitioner, Comingor, are
"equivalent to a plenary proceeding against
"him.

"XVI.

"In the court holding that the acts and pro-
"ceedings herein by or on behalf of the peti-
"tioner, Comingor, amount to or are equiva-
"lent to, or constitute a consent to the juris-
"diction of the referee in bankruptcy or the
"district court herein, in these proceedings
"against petitioner.

"Wherefore, your petitioner prays that the
"orders, judgments and decrees of the district
"court be reviewed and revised in the matters
"of law, and that it be adjudged that said dis-
"trict court was without jurisdiction, and if
"that can not be done, then adjudge that the
"summary proceedings herein were illegal
"and void, or, if that can not be done, then ad-
"judge that his responses were sufficient in
"law and he be discharged. He prays for an
"order of this Honorable Court, directing the
"district court to suspend the execution of its

"judgment of January 26, 1901, and all further proceedings against your petitioner in "this matter until the further order of this "court, and he prays further for all other nec- "essary and proper relief herein."

Upon this review the Circuit Court of Appeals reversed the district court (see opinion and order, pp. 59 and 60, of this record).

"POINTS OF LAW STATED".

For Leonard Comingor it is contended:

1. That the judgment of the Circuit Court of Appeals should be affirmed or this appeal dismissed, because the appellant or petitioner has not brought up the record as required by rules of this court.

2. That the proceedings had herein against said Comingor, were not in the nature of a "*suit*" or "*plenary action*"— but were nothing more than "*summary proceedings*".

3. That neither the referee nor district court had the right or jurisdiction to proceed in the *summary way had*, against said Leonard Comingor; he being an adverse claimant, who had appropriated and converted said money sought to be recovered before the proceedings in bankruptcy were filed, the trustee can proceed against him only by a "*plenary suit*".

4. That neither the referee nor district court had jurisdiction of a *summary proceeding* of the *trustee against an adverse claimant* who had converted the property before the proceedings in bankruptcy were begun, and can not obtain jurisdiction *in such a proceeding* by "*consent of the proposed defendant*".

5. That the acts of Comingor, in said proceedings, in no event, show that he "*consented*" to the jurisdiction of said referee or district court, or the summary proceedings had therein.

6. That the district court erred in holding the three responses, and each of them, insufficient in law, and the Circuit Court of Appeals was correct in reversing that ruling.

7. That the trustee is estopped from proceeding as against Comingor, by reason of the fact of his filing his petition in the suit pending in the state court brought by said Comingor, as assignee, to settle said estate, and on his motion being made party defendant thereto, and in drawing out of said case and accepting the funds, less said commission and counsel fee, in full satisfaction.

"ARGUMENT."

As to the first proposition:

That the judgment of the Circuit Court of Appeals should be affirmed or this appeal dismissed under rule of this court for want of sufficient record.

Rule 8, Subdivision 1, of the court provides:

> "The clerk of the court to which any writ "of error may be directed should make return "of the same by transmitting a true *copy of* "*the record*,' and of the assignment of errors "and all of the proceedings in the case under "his hand and the seal of the court."

Same rule (8), Subdivision 3, provides:

> "No case will be heard until a complete "record, containing in itself, and not 'by refer- "ence, all the papers, exhibits, depositions "and other proceedings, which are necessary "to the hearing in this court, shall be filed.'"

The writ in this case (page 7 of the record) commands the Circuit Court of Appeals for the Sixth Circuit to "send, without delay, to the Supreme Court, *the record* and proceedings in said cause."

The clerk of the Circuit Court of Appeals for the Sixth Circuit does not send up the *record*, and does not certify that what he sends up is the *record*, but he certifies that what he sends up is the *proceedings* in the Circuit Court of Appeals. His certificate is on page 71 of the record, and reads:

> "Pursuant to the command of the within "writ of certiorari, I, Frank O. Loveland, "clerk of the United States Circuit Court of

"Appeals for the Sixth Circuit, do herewith "transmit, under the seal of the said court, a "true, full and complete *copy of the proceed-* "*ings* in the said court, in the cause and mat- "ter in the said writ of certiorari stated."

He does not send the record here that was before the Circuit Court of Appeals, and upon which record their opinion is based, and their judgment rendered, and he is careful to certify that he only sends up the *proceedings* in the Circuit Court of Appeals, and not the *record*.

"It is the duty of the party who takes a writ "of error to see to it that the record is prop- "erly presented here."

Railway Company v. Stewart, 95 U. S. 279.

"Unless the fact upon which a 'reversal of "a judgment' is claimed appears in the record "sufficiently to be passed upon, the judgment "will not be reversed."

New York and Colorado Mining Syndicate & Co. v. Fraser, 130 U. S. 611.

Where the instructions are not in the record the court will presume that they covered defendant's request.

Andrews v. U. S., 162 U. S. 420.
Cohn v. Daley, 174 U. S. 539.

This record, page 1, shows, that on February 14, 1899, a petition in bankruptcy was filed against Simonson, Whiteson & Co., setting up that they had made an assignment to Comingor, and asked for an adjudication in bankruptcy, and prayed a subpoena against said alleged bankrupts and Comingor, and on March 21, 1899, said Comingor moved the court to dismiss as to him, and without waiving his rights tendered an answer. Neither the petition, the motion to dismiss, nor the answer tendered by Comingor, are in this record. All are in the record for review in the Circuit Court of Appeals, and all were considered by the said Circuit Court of Appeals in rendering its opinion and entering the judgment it did herein.

If this court does not affirm this case, then the same should be dismissed.

In Keen v. Littaker, 13 Pet., 459, the circuit court had given a judgment for the defendants on an agreed case, and the record sent here contained only the agreed state of facts, and the judgment of the circuit court, with the petition for the writ of error, and its allowance.

At that time the 11th rule of this court was like the present rule 8, Subdivision 1, and the 31st rule was like the present rule 8, Subdivision 3. In view of these rules and because the record did not contain any of the proceedings in the court below, this court dismissed the case. The same thing was done in the Curtis v. Petitprine, 18 How. 109.

The court below based its opinion on, and had before it the records in the two (2) former hearings of this case. In those records (not here), and of vital importance on this hearing, you find all the pleadings and proceedings. That we are not mistaken that the court below considered other records in rendering its opinion and entering its judgment, now complained of, we refer you, first, to the petition for review, page 2, where they are made a part of the said petition, and, second, to pages 60 and 66, of this record, where the court below rely on the contents of those records for reaching the conclusion that they do, and in reversing the district court. They comment on the original petition filed, and to which it was claimed Comingor was made a party, and the court says (page 66):

> "It is contended, in behalf of the trustee, "that Comingor was made a party to the peti- "tion for adjudication, and having thus been "brought in, he continued to be subject to the "orders of the court, without further or other "process. *But it appears that no special relief "was prayed against him*, etc."

If the court below did not have that original petition (in the first record) before them on the bill of review, how could they dissect it as they do? They also refer to Comingor's motion to dismiss, made soon after the petition was filed, and Comin-

gor's motion to file, and the tender of the answer, all of which forms parts of the records on the former appeals and now on file in the court below, and made part of the record in this case now on trial before you on certiorari.

You will find that the decisions of this court recently rendered in the case of Bardes v. Howarden Bank, Hicka v. Knost, Wall, et al., v. Cox, Trustee, etc., Reed Bryan, Marshal, etc., v. Bernheimer, all bankruptcy cases, bear directly on the case at bar, on the question of jurisdiction of the district court in bankruptcy, and it is necessary to compare pleadings and proceedings to that end. You will further find that you have not the record here to show how the district court undertook to get jurisdiction in case at bar; there is an utter absence of the record prior to the issuing of the "show cause" rules, the issuing of which constitutes the bases of this whole controversy.

You can not compare this case, therefore, with the others named, where you had the whole record, the main question being one of jurisdiction and form of action.

As to second proposition:

That the proceedings had against Comingor were not in the nature of a "*plenary action*" — that is a complete and formal suit—but were simply *summary* proceedings.

In the bankrupt proceedings, Comingor is made a defendant to the original petition, but no relief is sought against him, and no allegation made affecting him, further than the statement of the fact that he is the assignee under the deed of trust made for the benefit of the creditors.

Comingor entered motion asking to have this petition, as against him, dismissed, and, without waiving this motion, tendered an answer, but the motion was never acted on, nor was the answer ever filed, but both motions are still pending undetermined.

This petition made no claim against Comingor for this money—*the commissions and counsel fees* —and did not seek to recover *any money* from him. After said motion to dismiss was entered, in the subsequent proceedings had, Comingor was entirely ignored, and no action was ever taken against him on said petition. The pleadings on the original petition, as against Comingor, were never completed, no issue was tendered or any allegation made that would have been sufficient to sustain a judgment by confession or to have authorized any order against Comingor.

If these pleadings had been *completed*, or if the motion to file Comingor's answer had been acted on, and the court had refused to permit it to be filed—*then*, if the *allegations of the petitions had been sufficient*, —there might be some grounds for the claim that the proceedings had against Comin-

gor were, *in form* a plenary action, but with a motion to dismiss and an answer already tendered, and not acted upon, the conclusion is irresistible *that the trustee abandoned this action under the petition*, and resorted solely to the *summary method had before the referee.*

On September 20, 1899, a *final judgment* was rendered on this original petition in bankruptcy, and said judgment was affirmed by the Circuit Court of Appeals, and on the 17th day of May, 1900, the mandate of the Circuit Court of Appeals was filed. In said judgment, Comingor's name is not mentioned, and no order is made as against him or right enforced.

The "show cause" orders, the basis of the entire proceedings herein against Comingor, originated before the referee, and they had no connection with the petition; and it will not be contended that a *plenary action* can originate before a referee, therefore, the proceedings had herein were *necessarily summary.*

There were no parties—no one interested filed any basis for rules or asked the referee to issue them—probably they did not want it done.

Comingor had the right to believe that the creditors were satisfied with his management of the trust under the common law assignment to him and the expenses incurred, including his commissions and attorney's fees, because the assignment was made December 5, 1898, and he was

settling his accounts in a suit for that purpose in the state court, and the matter was in the hands of the master commissioner, the money in the state court and ready for distribution among creditors, when, for the first time, in June, 1900. more than a year and one-half after the assignment, the referee in bankruptcy, on his own motion, and not at the instance of the creditors or any one of them, or any party or privy, and without notice or appearance appointed the receiver and entered the show cause orders to pay back his commissions that he had spent in the meantime, and the fees paid his counsel, without right, jurisdiction, or any basis for any such orders.

It never was intended by Congress that the referee should ever be permitted to make orders t tosummarily turn over money or property, because he is directly interested. He receives one per cent on the amount distributed. (Sec. 40 of the Act of 1898.) To the extent of his commissions, he is a party in interest. Hence, if such procedure be permitted, you have a party in interest making orders and sitting in judgment in his own case.

As to the third proposition:

That neither the referee nor district court had the right or jurisdiction to proceed in the *summary way* had, against said Comingor.

The referee had no authority to issue the rules.

The jurisdictional facts do not appear that would have authorized him to act for the district court as required by Section 38, Subdivision 3.

There is no authority given to the referee under the Act of 1898 to issue such rules. Loveland's Law and Proceedings in Bankruptcy, page 95. He had no authority to apoint the receiver to whom Comingor was directed to pay the money, and had no authority to enter an order directing the collection of the money, and still less authority, if such were possible, to collect by contempt process.

The referee had no power to appoint the receiver, especially without any application of any party in interest and could make no order directing persons to turn over money or property to such illegally appointed receiver. The power is vested exclusively in *courts of bankruptcy* Section 2, Subsection 3, and *courts of bankruptcy*, are defined in Section 1, Subsection 8, and referees are not included.

No receiver can be appointed at all unless on application of parties in interest. Section 2, Subsection 3.

The jurisdiction is exclusive in the bankruptcy courts under Section 2, Subsection 7, to cause the estates of bankruptcy to be collected, distributed and determine controversies in relation thereto, except as in the act otherwise provided. The exception is Section 38, Subsection 3, which

provides that the referee may exercise the power of the judge in taking possession of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of the judge from the district, or his sickness or inability to act.

Section 69, which also provides for provisional seizure of property before election of trustee, vests the power in the judge to direct the seizure by the marshal, and Section 1, Subsection 16, defines the "judge" to be the judge of the court of bankruptcy, and expressly excludes the referee.

It will thus be noticed, first, that under no circumstances can the referee appoint a receiver or cause the estate of the bankrupt to be collected by summary remedy, except in the absence or inability of the judge, evidenced by the certificate of the clerk provided for in Section 38, Subsection 3. Second, that neither courts of bankruptcy nor referee, acting for the courts, as provided in Section 38, Subsection 3, can appoint receivers or marshals to take charge of property of bankrupts, except upon application of parties in interest. Section 2, Subsection 3.

Comingor had appropriated and converted this money before any proceedings in bankruptcy were filed; at the time he so appropriated said funds he had the lawful authority and right to do so; the deed of assignment was then a valid instrument and in full force and effect, and he, in

said act, was legally settling said trust created thereunder. He was an adverse claimant as against said receiver, who afterward became trustee, and both his right to and possession of said fund were complete before the proceedings in bankruptcy were instituted; and to maintain an action against him, the trustee must resort to a *plenary suit*, in the court having jurisdiction thereof, as provided in Section 23 of the Bankrupt Act of 1898.

In Bardes v. Hawarden Bank, 178 U. S. 538 (1180), it is said:

> "It was also repeatedly held by this court "that the right of an assignee in bankruptcy "to assert a title in property transferred by "the bankrupt before the bankruptcy, to a "third person, who now claims it adversely to "the assignee, could only be enforced by a "plenary suit at law, or in equity, under the "second section of the Act of 1867, and not "by summary proceedings, under the first sec- "tion thereof, notwithstanding the declara- "tion in that section, that the jurisdiction in "bankruptcy should extend 'to the collection "of all the assets of the bankrupt,' and 'to all "acts, matters and things to be done under "and in virtue of the bankruptcy' until the close of the proceedings in bankruptcy." Smith v. Mason, 14 Wallace, 419, 20 L. Ed., 748; Marshall v. Knox, 16 Wallace, 551, 21 L. Ed., 481; Eyster v. Gaff, 91 U. S. 521, 23 L. Ed., 403.

* * * * * *

"On the contrary, Congress, by the second "clause of Section 23 of the present Bank- "ruptcy Act, appears to this court to have "clearly manifested its intention that con- "troversies, not strictly or properly part of "the proceedings in bankruptcy, but inde- "pendent suits brought by the trustee in "bankruptcy, to assert a title to money or "property as assets of the bankrupt against "strangers to those proceedings, should not "come within the jurisdiction of the District "Courts of the United States, unless by con- "sent of the proposed defendant."

* * * * * *

"The District Court of the United States "can, by the proposed defendant's consent, "but not otherwise, entertain jurisdiction "over '*suits*' brought by the trustee in bank- "ruptcy to set aside fraudulent transfers of "money or property, made by the bankrupt "to third parties before the institution of the "proceedings in bankruptcy."

In April, 1901, this court decided, Wall et al. v. W. O. Cox, Trustee, etc. (see ad. sheets June 1, 1901), reaffirming the rule in the Bardes case, and deciding that the District Court of the United States had no jurisdiction of a bill seeking to recover property from parties claiming under adverse title obtained just *before the petition* in bankruptcy was filed, the basis of the latter petition being the transaction under which they got

title, that the trustee in bankruptcy, must proceed in the proper jurisdiction by plenary proceeding.

About the same time (see ad. sheets, May 15, 1901, p. 557), this court decided the case of Bryan v Bernheimer, holding that third parties obtaining title to property of the bankrupt *after* petition filed from the assignee of the bankrupt, took with notice and from the agent of the bankrupt, who was not an adverse claimant, and must deliver to the marshal who was directed to take possession under Clause 3 of Section 2, and Section 69 of the Bankruptcy Statutes. Attention is called by the court to the fact that in the Bardes case the trustee had been appointed whilst in this case he had not; and moreover the claimant Bernheimer had submitted the matter to the court, and Davidson (the assignee), who sold to Bernheimer after bankruptcy petition was filed, did not hold under any claim of right in himself, but held only under the general assignment.

The distinguishing features of this case are summed up by the court thus, viz.: Considering the property was not held by Davidson under any claim of right in himself, but under a general assignment, which was itself an act of bankruptcy; that no trustee had been appointed, that the sale by Davidson to Bernheimer was made *after and with knowledge of the petition in bankruptcy*, and that Bernheimer consented to the form of

proceedings, we are of the opinion that Bernheimer had no title superior to the title of the bankrupt estate.

The case at bar bears no similarity to the one last cited, but belongs to the class referred to in the Bardes case. In our case the assignee for over two (2) months had an action pending in the state court to settle his trust; had sold all the property under orders of the state court, paid out large sums of money for expenses, including his counsel and commissions to himself, and had paid the balance or nearly all into the state court *before any petition in bankruptcy was filed;* and the trustee in bankruptcy afterward became voluntarily under order of the bankruptcy court a party to the state court proceedings to obtain, and he did obtain, all the funds save a small balance left in the assignee's hands, which he turned over to the trustee. Thus the two sums of money now sought in this proceeding, viz.: the assignee's commissions and the fees paid his counsel, were no part of the bankrupt estate when the petition in bankruptcy was filed. The assignee had appropriated the commissions, paid the fees which is admitted the state court would have allowed, and paid out the same just as he had paid other expenses of his trust—all before any petition in bankruptcy. Money has no earmarks, and if the assignee had wrongfully appropriated too much or paid out more for fees to counsel or expenses,

and did not pay into the state court all that he should whilst acting under its orders and before he had any reason to suppose he would be stopped by proceedings in bankruptcy, the trustee having made himself party to the state court settlement suit could have obtained what he was entitled to. To say the least of it, at the time the petition in bankruptcy was filed, Comingor was holding no part of the money sought to be coerced from him in this proceeding, as assignee, or agent for the bankrupts for the purpose of distributing among their creditors. There was no property or specific fund of money in his possession belonging to the bankrupt's estate at the time the petition was filed—at most, there was a right in the creditors and the bankrupts to make him account in the state court settlement suit, which right was acquired by the trustee in bankruptcy afterwards, and which he could enforce by plenary proceedings as provided by the law that gave him his office (23 B. Bankruptcy Law), or in the state court where he made himself a party and started to act, or as said by Thompson, District Judge, in Stevens v. Flick, 2 N. B. N. & R. 1046, "at the time the petition in bankruptcy was filed the moneys were not on hand and the title thereto could not vest in the trustee in bankruptcy, but it is a serious question whether a right of action did not vest in the trustee against the assignee for the wrongful conversion of these moneys."

Under such circumstances Comingor was holding adversely to the trustee in bankruptcy, adversely to the bankrupt under whom the trustee claimed, under title acquired before any bankruptcy proceedings, and all were parties to the state court suit involving a settlement of any differences, and the district court was in error in sustaining the summary contempt proceedings, especially after directing the trustee to appear in the state court in the action involving the settlement of the account of Comingor as assignee.

In Mueller, Trustee, v. W. T. Nugent, decided by the Circuit Court of Appeals for the Sixth Circuit, January 8, 1901, it is said:

> "The person in possession of the fund be-
> "fore the petition in bankruptcy was filed,
> "could not be dispossessed by violence, or
> "otherwise, than by a '*plenary suit*,' where
> "his right to retain it could be tried and de-
> "termined."
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> * * * * * *
>
> "In the case of a general assignment for
> "the benefit of creditors, the assignment be-
> "ing void, the assignee's possession is without
> "right and the title as well as the right to
> "possession is in the assignee (trustee). But if
> "the latter can not recover the property
> "otherwise than by legal proceedings, he must
> "resort to the *ordinary legal remedies*."
>
> * * * * * *

"The fiduciary relation between them gives "the principal no extraordinary remedy to "compel the agent to deliver the property, "which he holds, to his master. That rela- "tion may affect the determination of the "court, when its jurisdiction has been prop- "erly invoked, but that is another matter. "The case with which we have to deal is one "where the bankrupt transfers the assets be- "fore the petition in bankruptcy is filed, and "the trustee has never had possession, and "where his right is given by the retroactive "operation of the law, resulting from the ad- "judication in bankruptcy."

It is earnestly insisted for Comingor, that he was not a proper or necessary party to said bankrupt proceedings, but if this contention is not correct, it is certainly true that the controversy between the trustee and Comingor, as to the funds now in question, which were appropriated and converted by said Comingor, before the proceedings in bankruptcy were instituted, and which he holds adversely to said trustee—is not strictly or properly part of the proceedings in bankruptcy, and, in no event, can the district court acquire jurisdiction of such a controversy, simply because Comingor has been, without his consent, made a party to said original petition in bankruptcy. To so hold would be in direct conflict with the twenty-third section of the present Bankrupt Act.

> "By the remedy pursued he (Comingore) was deprived of his right to a trial by jury." (Circuit Court of Appeals, opinion p. 67 of this record.)

The power of courts to order a reference in an action at law, without consent of the parties, is not derived from the common law, but is dependent wholly upon statute. And hence the Federal courts have no power to order a reference without consent, since there is nothing in the Constitution or laws of the United States granting such a power; and since, moreover, compulsory reference in cases involving more than twenty dollars would be in direct violation of the seventh amendment to the Constitution of the United States, providing that, "in suits at common law, where the value in controversy shall exceed twenty dollars, *the right of trial by jury shall be preserved.*"

> U. S. v. Rathborne, 2 Paine (U. S.), 578.
> Howe Machine Co. v. Edwards, 15 Blatchford (U. S.), 462.

In U. S. v. Rathborne, 2 Paine (U. S.), 578, the court, by Judge Thompson, said:

> "The convenience and utility of adopting "this mode of trial by referees, where the "controversy involves the examination of "long accounts, have led me to look at the

"question with a wish to find the practice "sanctioned by the Constitution and laws of "the United States, but I have not been able "to find any ground upon which such author- "ity can be sustained."

We quote from the opinion of the Circuit Court of Appeals in this case (Record, p. 67):

"But it may well be doubted whether such "a proceeding is due process of law in such "circumstances. Comingor had been ousted "of his trust, and the question was that of his "obligation to pay certain moneys alleged to "be in his hands belonging to the trustee. "By the remedy pursued he was deprived of "his right *to a trial by jury*. The determina- "tion of the referee upon the facts would not "be subject to appeal or writ of error. The "judgment would not be enforced by execu- "tion, but by process for contempt. The pro- "ceeding, when employed for such a purpose, "is in the nature of a civil remedy for the re- "covery of money."

The proceeding by contempt process in this case seeks to enforce the payment of *two specific sums of money* alleged to be held by Comingor *without right*. No equitable action could be brought for the same. The proceeding to recover must be at *common law*, with the right of Comingor to a "trial by jury."

As to the fourth proposition:

That neither the referee nor district court can obtain jurisdiction, in a summary proceeding, by the trustee against an adverse claimant, who obtained the property before the proceedings in bankruptcy were instituted—*by consent* of the proposed defendant.

By the authorities cited, under the "second proposition," it is clearly shown that such a claimant can be proceeded against only by "*plenary suit*" and in Bardes against the Hawarden Bank, it is held that the district court may obtain jurisdiction of *such a "suit"—by consent.*

As a general proposition, free from statutory enactment, a court can never obtain jurisdiction *by consent*, and it is only by reason of Subsection "b," of Section 23 of the present Bankrupt Act, that district courts can obtain jurisdiction of such suits *by consent*, and this section expressly limits the obtention of jurisdiction by consent to "*suits*" that is, ordinary legal remedies at law, or in equity, and not to summary proceedings, that are available only as part of the bankrupt proceedings.

In the case of In re Steuer, 104 Federal Reporter, it is said:

> "The defendant further objects that this "court has no jurisdiction to set aside a pre- "ference, even by the defendant's consent, un- "less the proceedings are by way of *plenary* "*suit.*"

And in this case, which is by petition, after making the quotations from the case of Bardes v. Hawarden Bank, made also in this brief, the court concedes that the *objection* is sustained by the Bardes case, but says:

> "Even with the defendant's consent to the "general jurisdiction of the court, the court "must, if the defendant insists, proceed by "plenary suit. But Stickney v. Wilt, 23 Wal- "lace, 150, and Milner v. Meek, 95 U. S. 252, "and, perhaps, White v. Ewing, 159 U. S. 36, "must still be taken to authorize a proceed- "ing by way of petition, where the court has "jurisdiction to proceed by plenary suit, "where no seasonable objection is taken to "the form of the procedures, and where, under "the form of a petition in bankruptcy the "rights of respondent are secured as substan- "tially as in a plenary suit."
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> • • • • • •
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> "In order that proceedings to recover prop- "erty may be validly commenced by petition "in bankruptcy, the petition must, as sug- "gested in Milner v. Meek, 95 U. S. 252, con- "tain a complete statement of the cause of "action, and a sufficient prayer for relief."

As shown, in the case at bar, the petition in bankruptcy did not set up a cause of action against Comingor, and did not pray for any relief against him. The motion to dismiss as to Comin-

gor, and the tender of answer, are still pending—the proceedings, by way of this petition, were abandoned, and the show cause orders can not relate back to this petition as a basis for their issual, and no petition was filed with the referee on which they could be issued, conceding that a petition could be filed before the referee as such foundation.

The rights of Comingor under these proceedings had, were not secured as substantially as in a plenary suit. This proceeding in effect begins with a finding against him in the nature of a judgment, and requires him to show cause why he shall not pay it. It is thought this case of In re Steuer goes even too far, in holding that a proceeding on a petition in bankruptcy is authorized, *unless objected to*, but in the case at bar no petition exists to sustain said summary proceedings.

Consent will not avail to give jurisdiction where the law provides the way in which the jurisdiction is to be invoked, and that way has not been complied with. Encyclopedia of Pleading and Practice, Vol. 12, page 120.

If Comingor had consented to the jurisdiction the procedure must be in the way pointed out by the "law of the land."

Though there be a consent to the jurisdiction, that jurisdiction can not be invoked in a proceeding commenced by contempt process. It must be a plenary suit.

He may consent to the forum, but no consent of his can change the mode of procedure.

In the language of Justice Field, in Windsor v. McVeigh, 93 U. S. 282:

> "Though the court may possess jurisdiction "of the subject matter and of the parties, it "is still limited in its modes of procedure and "in the extent and character of its judgments. "If, for instance, the action be upon a money "demand, the court, notwithstanding its com- "plete jurisdiction over the subject and the "parties, has no power to pass judgment of "imprisonment in the penitentiary upon the "defendant. If the action be for libel or per- "sonal tort the court can not order in the case "a specific performance of a contract. If the "action for the possession of real property, "the court can not admit in the case the pro- "bate of a will. The judgments given in the "cases mentioned would not only be erro- "neous, but void, because, the court, in ren- "dering them, would transcend the limits of "its authority in those cases."

Or, as the circuit court in its opinion in this case says, "the question of remedies is involved in that of jurisdiction." And further that the case of Marshall v. Knox, 16 Wal. 551, "shows that the question involved is one of jurisdiction, and that the party complaining of its exercise is not precluded from his objection by having contested a rule to show cause made by the bankruptcy court."

(See opp. of circuit court, pp. 67 and 68 of this record.)

As to the fifth proposition:

"That the acts of Comingor, in no event show that he consented to the jurisdiction or proceedings had."

1st. His first appearance in said proceeding is by a motion to dismiss said petition against him. This is an express refusal to consent. (Petition for review. Record, p. 1.)

2d. He next appeared before the referee, as required by rules, and filed a statement with him, taking credit therein to himself by the *commission and counsel fees*, now herein sought to be recovered. (Record, pp. 8 and 9; Exhibits 1 and 2.)

3d. He again appeared, by filing response, as required by rule or show cause order, to pay to the trustee $3,398.90, his commissions retained. In said response he says he is unable to pay, and he believes that the honorable court, on final hearing, will allow him, at least, said amount; and, finally, "he asks the court for such relief in the premises as the court deems proper." (Record, p. 15; Exhibit No. 7.)

4th. He again appears, by response, to "show cause order," requiring him to pay the trustee $3,000, the counsel fees paid out by him in administering said trust. In this response he says he is

unable to pay. That before the proceedings in bankruptcy were instituted, he filed a petition in the state court to settle this trust, and is now subject to the orders of said court, and he asks that this show cause order be annulled. (Record, p. 17; Exhibit No. 10.)

5th. He, finally, appears by filing an additional response, first, before the referee, then the court—in which he enters a special plea to jurisdiction of the court to proceed against him in the manner had. (Record, pp. 29 and 30; Exhibit No. 17.)

It is thus shown that every time Comingor appeared in said proceedings he was expressly objecting to the jurisdiction, except, perhaps, the third time he appeared; this was when he filed his first response, and in that, he, after stating that he was unable to pay, says, "he believes that the "honorable court, on final settlement, will allow "him, at least, said amount."

And at the conclusion of said response he says, "he asks the court for such relief in the premises "as the court deems proper."

Section 23 of the present Bankrupt Act does not give the district court jurisdiction of "*suits*" against adverse claimants, subject to be defeated by the seasonable objections thereto by the defendant, but to obtain such jurisdiction, the *consent* of the proposed defendant must be obtained, and such *consent* implies his free, deliberate and voluntary action, not a mere yielding by

him to what appears to be inevitable, such as a response to a coercive process, as in the case at bar.

But, it is submitted that the language used does not constitute a *consent* and when the entire actions of petitioner, in said proceedings, are considered as a whole, it is obvious that he did not consent to said jurisdiction; he emphasizes this by his motion to dismiss, which is still pending.

But, in the event that the court determines that petitioner did consent to the jurisdiction, that is sufficient, in case the proceedings are by way of a *plenary suit* — and, if it is by a petition in bankruptcy, *in which a cause of action is stated, and necessary prayer for relief made*, it may be still good, unless defendant objects to the form of the proceedings. But, in a proceeding like the one had in the case at bar, no consent of the defendant can give jurisdiction.

As to the sixth proposition:

The first and second responses filed show, that before the institution of the proceedings in bankruptcy, and while the deed of assignment was still a valid instrument, Comingor, in the settlement of said trust, paid the counsel fees and appropriated his own salary, and that he now has no money or property, and can not pay same back; these responses both show that Comingor had no criminal intent in what he did, and, further, that,

at the time he paid and appropriated said money, he had the right to do so; the deed to him was not void *ab initio*—but was only voidable, and, if the proceedings in bankruptcy had not been filed within four months thereafter, said deed could not have been set aside or held void. He alleges his inability to pay, and, unless this is proven not to be true, is a complete defense. But, upon the filing of these responses, without evidence or a hearing thereon, said referee at once holds them insufficient.

Comingor, between the time this trust under the deed of assignment was accepted by him, and the institution of the proceedings in bankruptcy, had paid out cash some $19,000, in administering said estate; can it be insisted that he can be compelled to pay this to this trustee? If not these, why single out the *commissions and counsel fees*, that came within the same class? The court did not find that Comingor had this money in his hands or could pay.

In pointing out the difference between the Acts of 1867 and 1898, Loveland, in his work on Bankruptcy, page 15, says:

> "Under the Act of 1867 the title to the bankruptcy property vested in the assignee (in bankruptcy) under conveyance, as of the date of the filing of the petition in bankruptcy; while, under the Act of 1898, it vests by operation of law in the trustee, as of the

adjudication. If the judgment is appealed, then the adjudication dates from the time that the judgment is confirmed, Section 1, Subdivision 2, Bankrupt Act, 1898."

The adjudication in this case was the day of April, 1900.

The common law deed of assignment was dated and executed December 5, 1898, so that the title vested in Comingor, December 5, 1898, and remained in him until the adjudication, April , 1900, undisturbed. He was bound, under his bond to the creditors, to execute his trust. In the meantime this litigation was going on between the bankrupts and some of their creditors, and Comingor did not know that there would ever be an adjudication. Had Comingor done nothing by way of executing the trust, laid dormant from December, 1898, to April, 1900, to see what the district court in bankruptcy was going to do, and the district court had refused to adjudicate them bankrupts, Comingor would have been liable on his bond to the creditors for over $90,000—realized by him—which is a fair value of the property vested in him by the deed of assignment. Besides his liability on his bond, and his oath to faithfully execute his trust, he was forced to believe that even the district court was satisfied with his management of the trust, because, soon after the petition was filed, the petitioning cred-

itors moved the judge of the district court to appoint a receiver, but the judge, upon a full hearing by all parties, and by counsel, refused to appoint a receiver, and left Comingor to continue to wind up his trust in the state court under the supervision of the chancellor, and no receiver was appointed until June 20, 1900. And that appointment was made by the referee on his own motion, and not upon the application of any one, and without notice, appearance or a hearing.

When the contempt results from a failure to obey an order of the court, the showing that such failure is due to an actual inability to comply with the order is a sufficient answer and purges the contempt.

7 Am. and Eng. Ency. of Law, page 72.
In re Hyman, 97 Federal Reporter, 195.
In re Purvine, 96 Federal Reporter, 192.
In re McCormick, 97 Federal Reporter, 566.
In re Mayer, 98 Federal Reporter, 839.
Brown v. Brown, 96 Kentucky, 505.
Walton v. Walton, 35 Atlantic Reporter, 289.
Kane v. Haywood, 66 N. C. I.
Adams v. Haskall, 6 Cal. 316.

And this was also held by the Circuit Court of Appeals in this case. (Record, p. 69.)

But it is contended for petitioner that *insolvency or inability to pay* is not a legal response to a rule to pay.

In this case respondent was, by the referee, ruled to pay, he, respondent, among other things, his insolvency and inability to pay. The referee held this response insufficient. He, thereupon, filed a bill of review, and the court rendered an opinion thereon, sustaining the referee, and refusing to allow any amount whatever to respondent or his counsel, and rendered judgment, based on said opinion, dismissing said bill of review and ordering respondent to pay said money by a day named. This was a summary proceeding that could form a basis only for a contempt proceeding, and in the opinion of the Circuit Court of Appeals, pages 69 and 70, in considering this matter, it was said:

> "The referee was of the opinion that the respondent was not entitled to any compensation whatever, and that he had no legal right to pay fees to his counsel without an allowance therefor by the state court, and that, therefore, he 'must be deemed to have the funds in his possession.' The court ordered a reference for a further report in regard to the question whether the respondent was entitled to any compensation for his services as assignee, and whether the counsel were entitled to any. But no question was referred touching the fact that the respondent had retained and spent the money he claimed to be due him for his compensation, or the fact that he had paid the sum mentioned to

his counsel, or the ability of the respondent to refund the moneys. The confirmation by the court affirmed the insufficiency of these facts to excuse the respondent from paying over the money, and the court, thereupon, ordered him to pay it before a day named. With these adjudications behind him there was nothing to follow but imprisonment, from which there could be no prospect of relief, but by reiteration of the same facts which would be unavailing. But it is well settled that a showing made by a respondent that he is unable to do an act required of him upon an order to show cause is a sufficient answer. It matters not for the purpose of such a proceeding that the inability to do the thing required may be in consequence of his own fault arising from a mere misconception of his rights, or, committed before the court, took jurisdiction of the matter; the court can not compel an impossibility. Hendryx v. Fitzpatrick, 19 Fed. 810, 814, per Lowell and Nelson, judges; In re Chiles, 22 Wal. 157, 168; Loveland on Bankruptcy, Sec. 239; Kane v. Haywood, 66 N. Car. 1.

"Other remedies may exist for punishing the petitioner, if there is ground for it, or for establishing a civil liability if the necessary facts exist.

"The result is that the orders of the referee adjudging the responses of the petitioner insufficient, and the order of the court confirming the same, must be set aside."

In the brief for petitioner, page 14, it is said:

> "If this case is affirmed and the petition for a review denied, Comingor will still have an opportunity to recover the $3,000 from Messrs. Sachs, or else to show his inability to obtain it. And if he convinces the court that he has really spent the $3,398.90, and is unable to pay it, and further convinces the court that his counsel will not return, and can not be compelled to return the $3,000, surely the court will not punish him for his failure to do an impossibility; but, as above explained, the question of punishment has never arisen in the lower court, and I apprehend will not be determined on the petition for review until it has been first decided there."

Respondent has no right of action against his attorneys for the money paid them, and if any such right existed, it is now certainly vested alone in the trustee.

Respondent's answer of his insolvency and inability to pay was certainly a good response to the rule to pay, and it was not necessary that he be taken into custody for contempt before he could file and rely on same to stop further proceedings of said rule, and when it is held by the court insufficient and he ordered to pay by a day named, it is believed to be such a final order as will be considered on review, as he has already answered that he can not pay, and it must be

taken that further failure to comply with said order by reason of said insolvency, would necessarily mean punishment to him, as that would be the natural result of such proceedings, and it must be held that same was intended. If he must wait until the specific punishment is adjudged, then he must suffer, perhaps wrongfully, before he can obtain relief, and this the law never contemplated. The holding of his answer insufficient and the judgment to pay, notwithstanding same, is a final order and decision upon his rights.

The fixing of the extent of the punishment for said contempt relates more to the execution of the judgment than the rights of the respondent which has already been determined. As shown by the transcript (record, p. 58), when this bill of review reached the Circuit Court of Appeals, in order to sustain a suspension of the infliction of the punishment for contempt, respondent again filed his same defense therein as pleaded in the court below, and is as follows:

> "On our motion to stay the execution of the judgment in the district court, and hear the review, without bond, we filed the affidavit of the petitioner, Leonard Comingor, to conform with the decision of the Supreme Court of the United States in the case of Davis against Speiden, 104 U. S., page 83.
>
> The affidavit reads as follows (record, p. 58):

No. 943.

UNITED STATES CIRCUIT COURT OF APPEALS.

Sixth Circuit.

SINSHEIMER, LEVINSON & COMPANY v. SIMONSON, WHITESON & COMPANY.	In the matter of the petition of Leonard Comingor to review an order of the District Court of the United States for the District of Ky.

"The petitioner and affiant, Leonard Comingor, says, on oath, that his insolvency, shown in his responses, on pages 18 and 21 of this record, still exists, and he says that he is utterly unable to comply with the judgment of the district court, requiring him to pay to the Louisville Trust Company, trustee herein, the sums of $3,398.90 and $3,000, or either of said sums, or any part thereof. He says he has no means and no possible way, by or from which, he could raise the money to pay to said trustee or bring it into court, and all of this because of the great financial embarrassment under which he is now laboring. He says he is unable on account of his poverty, want of assets and financial embarrassment aforesaid, to give security for the money or execute any bond for a stay of these proceedings

against him, or to execute a supersedeas bond herein.

"Leonard Comingor.

"State of Kentucky, County of Jefferson:

"I, Edward C. Mumphrie, a notary public in and for the county and state aforesaid, do hereby certify that on this day the foregoing affidavit was subscribed and sworn to before me by Leonard Comingor. My notarial commission expires at the expiration of the next Senate of Kentucky.

"In testimony whereof, witness my signature and official seal, this 14th day of February, 1901.

(Seal.) "Edward C. Mumphrie,

"Notary Public in and for Jefferson County, State of Kentucky."

And the Circuit Court of Appeals granted the stay order. (Record, p. 57.)

By Section 990 of the Revised Statutes of the United States, it is provided:

"No person shall be imprisoned for debt in any state on process issuing from a court of the United States, where, by the laws of such state, imprisonment for debt has been or shall be abolished. And all modifications, conditions and restrictions upon punishment for debt, provided by the laws of any state, shall be applicable to the process issuing from the courts of the United States to be executed

> therein; and the same course of proceedings shall be adopted therein as may be adopted in the courts of said state."

By the 18th Section of the present Constitution of Kentucky, it is provided:

> "The person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditors in such manner as shall be prescribed by law."

As to the seventh proposition:

That the trustee is estopped from proceeding herein, by reason of the filing of his petition in the state court and being made a party defendant to those proceedings, and bound by his conduct there and the judgment there rendered.

At the same time that the bankruptcy court entered the show cause orders against Comingor seeking to enforce by contempt process the payment of the funds in the adverse possession of Comingor in part and expended by him in part, before any proceedings in bankruptcy, the trustee in bankruptcy appeared in the state circuit court in the action there pending, which is referred to in Comingor's response, being brought for the purpose of settling his accounts as assignee under deed of assignment, and for distribution among creditors.

Having been directed by the state circuit court to file his petition as required by Section 29 of the Code of Practice for Kentucky, the trustee in bankruptcy filed his petition accordingly. The section of the Code of Practice referred to reads as follows, viz.:

> "Section 29. In an action or proceeding for "the recovery of real or personal property, or "for the subjection thereof to a demand of the "plaintiff under an attachment or other lien, "any person claiming a right to, or interest in, "the property or its proceeds, may, before "payment of the proceeds to the plaintiff, file, "in the action, his verified petition, stating his "claim and controverting that of the plain- "tiff; whereupon the court may order him to "be made a defendant; and upon that being "done, his petition shall be treated as his an- "swer. But if he be a nonresident, he must "give security for costs."

The trustee in bankruptcy, in his claimants' petition under said Section 29, stated to the state court, among other things, that

> "the officers of this court (state circuit court), "the clerk, sheriff and commissioner, have "been paid all their fees and have no claims "upon the fund herein, and that the fund in "court herein, viz., the sum of $46,305.03, be- "longs to the creditors of said bankrupt firm, "and that nobody else has any interest there-

"in, neither officers, attorneys nor anybody "else, and that under said proceedings the "title to said fund has passed to your peti- "tioner, as the trustee in bankruptcy, for the "benefit of all of the creditors of said bank- "rupts.

"Wherefore, your petitioner prays the court "that this its petition be filed, and further "prays the court to order and direct that the "plaintiff make your petitioner a defendant "herein, and that your petitioner's pleadings "and petition be taken as its answer and peti- "tion herein to the fund in court; and further "prays the court to order and direct the re- "ceiver of this court to pay to your petitioner, "as trustee in bankruptcy in said proceedings "in bankruptcy, under and by virtue of the "proceedings, appointment order and qualifi- "cation, the said sum of $46,305.03, and fur- "ther respectfully apply to the court for all "further and proper relief."

Based upon this petition of the trustee in bankruptcy, the state circuit court entered an order, in which it appears as follows, viz.:

"And thereupon said petitioner, by Augus- "tus E. Willson, attorney, moved the court "that said petitioner, the Louisville Trust "Co., trustee in bankruptcy of said bankrupts, "Simonson, Whiteson & Co., D. G. Simonson, "I. Whiteson and Leo Stern, be made party "defendants to this action; and thereupon "said trustee moved the court that said peti-

> "tion be taken as the answer and petition of
> "the said Louisville Trust Company, as such
> "trustee, claiming the fund in court herein,
> "which is so ordered by the court."

The court then proceeds to give the trustee in bankruptcy leave to withdraw the fund in court.

We respectfully urge that by this conduct, the bankrupt trustee abandoned the summary proceedings then pending in the bankruptcy court. He became party to the state court action involving a settlement of Comingor's accounts as assignee under the deed of assignment, seeking to obtain the bankrupt's assets from adverse claimants.

He took the proper course when he went into the state court, as appears from the decision in Bardes v. First National Bank of Hawarden, in construing Section 23 of the Bankrupt Act of 1898.

In the case cited, this court decides that the District Court of the United States can not entertain jurisdiction over suits brought by trustees in bankruptcy to recover money or property from third parties, paid or conveyed to them before the institution of the proceedings in bankruptcy. As is stated in the opinion:

> "One object in inserting this clause in the
> "act may well have been to leave such con-
> "troversies to be tried and determined for the

"most part in the local courts of the state, to "the greater economy and convenience of liti- "gants and witnesses." (Sec. 1006. Vol. 20, Sup. Ct. Reporter.)

When the trustee took the proper course, by going into the state court, he said to that court, in his pleadings, and stated as a basis upon which to grant him the relief prayed, that Comingor, his counsel in the state court, and all of the state court officers interested in the fund in court, were paid. He could not otherwise have obtained the granting of his prayer for the fund in that court. The state circuit court was a court of competent jurisdiction, the trustee and Comingor were parties, and the trustee formally states of record that Comingor and his counsel, and every one but the creditors, have been paid, in order to get the fund remaining in court, and then turned about in the bankruptcy court to resume the coercing, by summary process, of the paying back of the money that was ascertained in the state court by his admission to have been properly paid to Comingor and his counsel. The trustee in bankruptcy received the whole balance of the money in court, under a judgment or order of court, ascertaining practically that it was in full settlement of Comingor's account with creditors, and the trustee still holds the fund.

Having obtained the aid of an injunction from

the bankruptcy court, preventing Comingor from interfering with his getting the fund in the state court, the trustee in bankruptcy is doubly estopped from his wrongful attempt in this proceeding.

It would be useless to refer the trial of such issues to the local courts of the state if, after the local court has rendered its judgment and the plaintiff has obtained the relief he prayed, he can turn about in the Federal courts and ask relief under the circumstances above indicated. This proceeding being by summary process, and not a plenary suit, as it should have been, there was no way in which Comingor could have formally pleaded these matters. But the court in bankruptcy directed and ordered its officer to enter appearance and become party to the state court suit for the purpose of obtaining the judgment of the state court. The officer of the court in bankruptcy acted under the supervision of the court, and the fund obtained by him was taken into the court in bankruptcy, all of which appears in its records.

It must also be remembered that the record was closed before the referee, Comingor's responses had been adjudged insufficient, and rules made absolute and a petition for review had been filed, when the trustee in bankruptcy took the steps above indicated. The matter was then pending on a petition for review by the district court, on a record made up, and Comingor was enjoined

from taking any action in the state court, thus preventing him from showing the facts to that court.

Petitioner entered motions in the Circuit Court of Appeals below to dismiss the petition for review for want of jurisdiction, setting up that it is a question for appeal and not review; also moved to strike out, file answer and file an affidavit for certiorari and complains here because the court below overruled the motions. There is no provision in the Bankrupt Act for the filing of an answer to a bill of review.

The writ of certiorari goes to supply records on appeal where the records are made up and certified by the clerk below; but on bills of review involving only the review of questions of law, no record is made up but a petition is filed setting out the errors of law complained of.

> Bankrupt Act, 1898, Sec. 24b.
> Loveland's Law & Procedure in Bankruptcy, pages 665 and 666.

We are asserting no *claim* against the estate, and have always held, and are still holding, as *adverse claimants*, so that Section 25 of Bankrupt Act, 1898, covering appeals, does not embrace a case like ours.

> Loveland on Bankruptcy, page 668.

It is submitted that the judgment of the Circuit Court of Appeals ought to be affirmed.

Alexander Pope Humphrey

MORRIS A. SACHS,

D. A. SACHS,

J. G. SACHS,

W. M. SMITH,

Counsel for Leonard Comingor.

Supreme Court of the United States.

No. 309.—October Term, 1901.

The Louisville Trust Company, Trustee, &c., Petitioner, *vs.* Leonard Comingor. } On writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 27, 1902.]

December 5, 1898, Simonson, Whiteson and Company, the firm consisting of three partners, made an assignment to Leonard Comingor for the benefit of their creditors, under the statutes of Kentucky in that behalf, and a few days thereafter Comingor brought suit involving the administration and settlement of the estate in the Circuit Court of Jefferson County.

The State statute provided, among other things, that the assignee should give bond with good security to be approved by the county judge, conditioned for the faithful discharge of his duties as assignee, and to be recorded in the county clerk's office; that the assignee should be at all times subject to the orders and supervision of the county court, or the judge thereof in vacation, except as thereinafter provided; for the final discharge of the assignee on due notice; and that the assignee or any creditor or creditors representing one-fourth of the liabilities might bring suit in the Circuit Court for the settlement of the estate, whereupon the jurisdiction of the county court should cease, and the Circuit Court should have all the power and authority to administer and settle up the assigned estate conferred on the county court, in addition to its power and authority as a chancery court. Kentucky Statutes, 1899, p. 202, c. 7.

Certain creditors filed a petition in the Circuit Court of the United States for the District of Kentucky in bankruptcy, on February 14, 1899, against the firm, to which its members tendered a plea and answer. The ground on which the petition was based was that Simonson, Whiteson and Company had within four months of the filing of the petition made a general assignment under the statutes of Kentucky for the benefit of creditors to Comingor. The court adjudicated them bankrupts, (92 Fed. Rep. 914,) and one of them prosecuted an appeal to the Circuit Court of Appeals for the Sixth Circuit, which, July 5, 1899, reversed the judgment with directions to take further proceedings. 95 Fed. Rep. 948.

On September 20, 1899, adjudication was again awarded, and on a second appeal was affirmed February 12, 1900. 100 Fed. Rep. 426.

Comingor was made a defendant to the petition in bankruptcy as assignee, but no relief was prayed as against him, and he moved the court to dismiss the petition as to him for want of jurisdiction, and also, without waiving the motion, tendered an answer, but the motion was not acted on, nor was his answer filed.

April 1, 1899, an injunction was granted against Simonson, Whiteson and Company, and Comingor, from taking any steps affecting the bankrupts' estate, and especially in the action in the Jefferson Circuit Court.

May 17, 1900, the case was referred to a referee, who, on May 28, without notice, entered an order that Comingor file with him an itemized and detailed statement, showing his receipts and disbursements of the money and other assets belonging to the estates of Simonson, Whiteson and Company and its members. This Comingor did, the statement showing that he had received $92,865.77; that he had disbursed $19,876.73; that he had paid his counsel $3,200; that he had drawn as commissions, $3,300; that he had paid over to the receiver of the State court $59,623.61; and that he had on hand $6,766.53. This sum of $6,766.53 was subsequently paid the trustee in bankruptcy.

June 20, 1900, the referee on his own motion entered an order appointing the Louisville Trust Company, receiver, and directing it to apply to the Jefferson Circuit Court for an order directing the receiver of that court to pay over the entire fund in court, in Comingor's action there; but providing that the Trust Company should not appear in the Jefferson Circuit Court as a party to that action, nor receive any less sum than the whole fund in that court. Application was accordingly made by the Trust Company, but the Jefferson Circuit Court declined to entertain the motion to withdraw the funds, because the Trust Company was not a party to the action and had no standing in court, but the Circuit Judge suggested that when the Trust Company filed its petition asserting its claim to the fund, as provided by section 29 of the Code of Kentucky, the court would then be authorized to entertain such motions and make such orders in its behalf as might be necessary and proper.

The Trust Company appears to have been appointed trustee by the referee June 30, 1900, its bond as such trustee being then approved.

On the same day the referee entered an order that the Trust Company file a petition to be made a party to the suit in the Jefferson Circuit Court, and thereupon such petition was filed by it as trustee, stating among other things that the officers of the court had been paid in full and had no claims on the fund in court, and that the fund, to wit, $46,305.03, belonged to the creditors of the bankrupt concern and that nobody else had any interest therein, neither officers, attorneys nor anybody else, and praying that the court be directed to make the Trust Company a defendant, and that its petition be taken as an answer, and that the receiver of the said

Circuit Court pay to petitioner the said sum of $46,305.03, and "for all further and proper relief." The Jefferson Circuit Court thereupon entered an order making the Trust Company a party defendant, and directing that it be allowed to withdraw from the fund in court the sum of $46,305.03.

June 20, the referee, on his own motion, entered an order requiring Comingor and his counsel to appear and show cause three days thereafter why they should not pay over to the receiver the amount of the commissions and fees.

June 23, Comingor responded as to the sum of $3,398.90 that he had retained the same on account of his commissions as assignee before any bankruptcy proceedings were had, and that he relied on the fact that he would be entitled to more than that sum on the final settlement; that for services rendered to the estate he believed this court would allow at least said amount; that he was a person of no means; and had used said money from time to time, relying on the fact that it belonged to him, and had none of it left; and that he was unable to pay said money into court, as he had no money or property of any kind.

The referee held the response insufficient, and made the rule absolute. The order to show cause made on the attorneys does not appear to have been pursued, but June 28, 1900, another order was made on Comingor to show cause why he should not be required to pay to the receiver the sums of money paid to them, amounting to $3,200 in all.

June 30, 1900, Comingor responded that he had paid the $3,200 to his attorneys for services rendered him as his counsel while acting as the assignee before any proceedings in bankruptcy were taken. He further alleged that he had no money or means of any kind with which to pay, and referred to his former response and made it a part thereof, and insisted that he ought not to be compelled to pay the amount claimed.

The referee adjudged this response insufficient, and made the rule absolute.

Comingor then prayed for a review by the District Court in bankruptcy of the orders adjudging his responses insufficient, and ordering him to pay to the receiver the sums of $3,398.90 and $3,200 respectively.

The referee reported his findings to be that Comingor was entitled to no compensation whatever, and that he had no legal right to pay attorney's fees when no allowance had been made by the State court therefor, and that in contemplation of law he must be deemed to have the funds in his possession.

The District Judge referred the matter back to the referee July 16, 1900, to take testimony as to the character and value of Comingor's services and those of his counsel. The referee proceeded to do this, pending which, on November 10, Comingor tendered an amended response before the referee, setting forth that as was shown by the pleadings, records and evidence in the case, and the entire proceedings had, neither that court nor

the referee in bankruptcy had any jurisdiction, either of the respondent or the matter involved, to make any such orders or require respondent to answer thereto, because the records showed that all the transactions in reference to the two sums of money took place before the petition in bankruptcy was filed, and that neither that court nor the referee in bankruptcy could proceed against respondent as attempted by order or rule to pay over or by summary process. He prayed that the rule be discharged and the orders to pay be set aside. This amended response the referee declined to entertain, and it was again tendered in the District Court on the filing of the referee's report.

December 11, 1900, the referee reported the evidence and his conclusions thereon, that neither Comingor nor his attorneys had rendered any services of value to the estate, and that their services had in fact been injurious to the creditors, but that the fees paid to the attorneys were usual and reasonable according to the scale of compensation allowed for such services by the State court in Louisville.

The District Judge confirmed the report of the referee, and as to the objection of want of jurisdiction, held that it could not be entertained by the court for the reason that, by long acquiescence in that mode of procedure, respondent must be regarded as having consented thereto. Thereupon an order was entered dismissing the petition for review, and adjudging that Comingor pay to the Trust Company, as trustee, the said sums of $3,398.90 and $3,200, on or before February 16, 1901, to all of which Comingor excepted, and filed his petition for review in the Circuit Court of Appeals for the Sixth Circuit. That court entered an order staying proceedings in the District Court, and thereafter on hearing reversed the decree of the District Court affirming the orders of the referee requiring Comingor to pay to the trustee the sums aforesaid, with directions to set aside its order and decree, and the orders of the referee directing Comingor to pay the trustee in bankruptcy the moneys mentioned in said orders. 107 Fed. Rep. 898.

Certiorari from this court was then granted. 181 U. S. 620.

Mr. Chief Justice FULLER delivered the opinion of the Court:

The Circuit Court of Appeals was called on to review the orders of the referee as confirmed by the District Judge, by which Comingor was required to pay over the sums of $3,398.90 and $3,200, respectively, and the recommendation that he be dealt with for not complying therewith.

On the face of his responses, from first to last, it appeared that Comingor insisted that the $3,200 had been paid by him to his counsel while they were acting for him, before the bankruptcy proceedings were commenced, for professional services rendered to him as assignee; and that he had

retained and expended the $3,398.90 as his commissions as assignee in reliance on the belief that he was entitled to that amount on final settlement. He thus asserted a claim to each of these sums adversely to the bankrupt, and as outstanding when the petition in bankruptcy was filed, and these claims were in fact passed upon by the referee and the District Judge as being adverse. This brought the controversy within the ruling in *Bardes* v. *Bank*, 178 U. S. 524, and the questions attempted to be litigated before the referee and in the District Court as to the allowance of the two amounts could only be raised in the District Court by consent, and then only by plenary suit. If the jurisdiction of the District Court was not consented to, then the State court, under the circumstances of this case, was the proper forum, and the matters in dispute were to be disposed of there.

The District Court held that Comingor had voluntarily accepted its jurisdiction, and that he had also consented that the court might proceed against him summarily. As the Circuit Court of Appeals said, speaking through Severens, J., "it was upon the ground of the petitioner's implied consent to the mode adopted that the District Judge justified it."

So far as this view rested on the contention that as Comingor was joined with the bankrupts in the petition for adjudication, he therefore continued to be subject to the orders of the court without other process, we agree with the Circuit Court of Appeals that it cannot be sustained. As we understand the record, the petition in bankruptcy set up no cause of action and prayed no special relief against Comingor, and he was apparently made a defendant because adjudication would put an end to further action by him as assignee. Clearly, as the Circuit Court of Appeals points out, it would be inadmissible to permit creditors to deprive an assignee of his right to have his claims adjudicated by the proper court and in the customary mode of proceeding, by the device of making him a party to the petition for an adjudication and so attempting to bring him into the case for all purposes. Nor in this matter was any petition by the trustee, or by any other person, filed against Comingor to recover these sums, and the orders were entered by the referee on the record as it stood, so that there was no pretense whatever of a plenary suit in that court, in form or in substance.

The proceeding was purely summary. The determination of the merits on the facts was not open to revision by appeal or writ of error under the bankrupt law. If Comingor had been entitled to a trial by jury, he could not have obtained it as of right. The collection of the amounts found due would be enforcible not by execution but by commitment.

"We think that it could not have been the intention of Congress thus to deprive parties claiming property, of which they were in possession, of the usual processes of the law in defense of their rights." *Marshall* v. *Knox*, 16 Wall. 556; *Smith* v. *Mason*, 14 Wall. 419.

The question is whether the District Court had jurisdiction to finally adjudicate the merits in this proceeding.

We have just held in *Mueller* v. *Nugent*, *ante*, p. ——, that the District Court has power to ascertain whether in the particular instance the claim asserted is an adverse claim existing at the time the petition was filed. And according to the conclusion reached the court will retain jurisdiction or decline to adjudicate the merits. Jurisdiction as to the subject matter may be limited in various ways, as to civil and criminal cases; cases at common law or in equity or in admiralty; probate cases, or cases under special statutes; to particular classes of persons; to proceedings in particular modes; and so on. In many cases jurisdiction may depend on the ascertainment of facts involving the merits, and in that sense the court exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it finds that it cannot go farther. And where in a case like that before us, the court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on review.

We are of opinion that even if Comingor could have consented to be pursued in this manner, he did not so consent. He was ruled to show cause, and the cause he showed defeated jurisdiction over the subject matter, that is, jurisdiction to proceed summarily. He did not come in voluntarily, but in obedience to peremptory orders, and although he participated in the proceedings before the referee, he had pleaded his claims in the outset, and he made his formal protest to the exercise of jurisdiction before the final order was entered. He had been restrained from settling his accounts in the State court in the action pending there, and the District Court, instead of dissolving the injunction, declining jurisdiction, and leaving the litigation to the State court, either in due course, or by plenary suit, adjudicated the merits and entered a peremptory order that he should pay over, disobedience of which order was punishable by commitment. We think that in this there was error, and that the Circuit Court of Appeals was right in its decree of reversal.

Decree affirmed.

Mr. Justice HARLAN dissented.

True copy.

Test:

Clerk Supreme Court, U. S.